Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

H.J. HEINZ CO., HEINZ ITALIA, S.p.A., HEINZ DOLCIARIA S.p.A. (formerly known as SPERLARI S.p.A.), SPERLARI s.r.l., and HERSHEY FOODS CORPORATION,

Petitioners,

v.

DAYHOFF, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals below analyzed the enforceability of a forum selection clause in an international commercial agreement that required adjudication in Italy and under Italian law of all controversies arising from or relating to the agreement. The question presented is:

Whether the forum selection clause should apply to all claims filed in the United States by one signatory of the agreement against the other signatory and certain non-signatories (including affiliates of the signatory), when all claims – both the breach of contract claims against the signatory and the tortious interference claims against the non-signatories – require for their resolution a determination of whether one signatory has breached the agreement.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties who were parties to the proceedings below before the United States Court of Appeals for the Third Circuit.

Pursuant to S. Ct. Rule 29.6, petitioner H.J. Heinz Company notes that it has the following nonwholly owned subsidiaries: Establissements Paul Paulet, S.A.; H.J. Heinz Botswana (Proprietary) Limited; Olivine Holdings (Private) Limited; ESET, s.r.o.; Cairo Food Industries, S.A.E.; Custom Foods Ireland, Ltd.; Fitnessland, Inc.; Fruitsi Concentrados; Heinz UFE Ltd.; Heinz Win Chance Ltd.; Indian Ocean Tuna Limited; and Seoul-Heinz Ltd.

Pursuant to S. Ct. Rule 29.6, petitioner Heinz Italia S.p.A. notes that it has been merged into Plasmon Dietetici Alimentari S.p.A., and that its parent corporation is H.J. Heinz Credit Company, a wholly owned subsidiary of petitioner H.J. Heinz Company.

Pursuant to S. Ct. Rule 29.6, petitioner Heinz Dolciaria S.p.A., now known as Heinz Dolciaria s.r.l. and formerly known as Sperlari S.p.A., notes that its parent corporation is Plasmon Dietetici Alimentari S.p.A., and, as explained above, petitioner H.J. Heinz Company is its ultimate parent corporation.

Pursuant to S. Ct. Rule 29.6, petitioner Sperlari s.r.l. notes that Hershey Holding Corporation is its parent corporation. Hershey Holding Corporation, in turn, is a wholly owned subsidiary of petitioner Hershey Foods Corporation.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Pursuant to S. Ct. Rule 29.6, petitioner Hershey Foods Corporation notes that it has no parent corporation and that it does not have any nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners H.J. Heinz Co. ("H.J. Heinz"), Heinz Italia S.p.A. ("Heinz Italia"), Heinz Dolciaria S.p.A. ("Heinz Dolciaria"), Sperlari s.r.l. and Hershey Foods Corporation ("Hershey") seek a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Third Circuit, which reversed in part an order granted by the United States District Court for the Western District of Pennsylvania dismissing claims against these petitioners.

OPINIONS BELOW

The Opinion and Order of the Court of Appeals for the Third Circuit dated June 24, 1996, is reported at 86 F.3d 1287 (3d Cir. 1996), and is reprinted in the appendix hereto ("App.") at 1a. The Order of the Court of Appeals panel dated July 24, 1996, granting petitioners' petition for rehearing and amending the panel's slip opinion is reprinted at App. 40a. The Order of the Court of Appeals dated July 24, 1996, denying petitioners' petition for rehearing in banc is reprinted at App. 44a. The Opinion and Order of the United States District Court for the Western District of Pennsylvania dated October 3, 1994, granting petitioners' motion to dismiss is reprinted at App. 46a.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its panel opinion on June 24, 1996. By order dated July 24, 1996, the Court of Appeals granted petitioners' timely filed Petition for Rehearing for purposes of amending the original panel opinion. The Court of Appeals denied petitioners' petition for rehearing in banc by separate order dated July 24, 1996. This petition for a writ of certiorari is being docketed in this Court within 90 days from the Third Circuit's July 24, 1996 Orders. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition for writ of certiorari concerns claims by Dayhoff, Inc. ("Dayhoff") arising from two contracts between Dayhoff (or its affiliate, Dayhoff Australia Pty, Ltd.) and Heinz Dolciaria (or its predecessor, Sperlari S.p.A.) for the manufacture and distribution of a candy known in Italy as "Frutteto." These contracts were:

1. A contract dated October 19, 1989, between Sperlari S.p.A. and Dayhoff Australia Pty, Ltd., which permitted Dayhoff Australia to manufacture and sell candy in Australia and India using knowhow supplied by Sperlari S.p.A. (hereinafter "the 1989 License Agreement"). According to Dayhoff, this agreement subsequently was transferred to Dayhoff, and the license to manufacture was extended to the United States.

2. A contract dated July 26, 1990, between Sperlari S.p.A. and Dayhoff, which granted Dayhoff the right to distribute Frutteto candy in the United States (hereinafter "the 1990 Frutteto Distribution Agreement").[1]

The 1989 License Agreement included a section requiring that Italian law would govern the interpretation of the contract. The agreement also included the following arbitration provision:

> All controversies *arising from the present contract or relating to the same* will be definitively settled according to the Reconciliation and Arbitration Rules of the International Chamber of Commerce, excluding recourse to the common law courts, by one or more arbitrators appointed in accordance with these Rules.
>
> The arbitration tribunal will decide on its competence to decide the matter and on the validity of the arbitration clause.
>
> Each party can apply to the relevant Law Courts to confirm the arbitration sentence or enforce execution of the same.
>
> Arbitration proceedings will take place in Milan.

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[1] This litigation also involves a third contract between Dayhoff and Heinz Dolciaria. That contract, dated July 17, 1992, granted Dayhoff the right to distribute four additional candies in the United States (hereinafter "the 1992 Distribution Agreement"). Petitioners do not seek Supreme Court review of the Court of Appeals' rulings with respect to Dayhoff's claims relating to the 1992 Distribution Agreement. Accordingly, in this petition petitioners will discuss only Dayhoff's claims relating to the 1989 License Agreement and the 1990 Frutteto Distribution Agreement.

Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1289 (3d Cir. 1996); App. 4a (emphasis added).

The 1990 Frutteto Distribution Agreement also provided that Italian law would govern the interpretation of that contract. With respect to forum selection, the 1990 Frutteto Distribution Agreement provided that "the parties hereto irrevocably submit to the *exclusive jurisdiction* of the Court of Cremona (Italy)." *Id.* at 1290; App. 5a (emphasis added).

On or about September 14, 1993, Heinz Italia, Heinz Dolciaria's parent corporation and a subsidiary of H.J. Heinz, sold virtually all of its confectionery business to Hershey Holding Company, a subsidiary of Hershey. This sale was accomplished through the formation of a new company, Sperlari s.r.l., the transfer of substantially all the assets and liabilities of the confectionery business to Sperlari s.r.l., and the sale of the stock of Sperlari s.r.l. to Hershey Holding Company. Shortly after this sale, on September 28, 1993, a termination letter was issued with respect to the Dayhoff contracts described above.

On October 29, 1993, Dayhoff filed its original Complaint in this action in the United States District Court for the Western District of Pennsylvania based on diversity jurisdiction under 28 U.S.C. § 1332. Named as defendants were H.J. Heinz, Heinz Italia, Heinz Dolciaria, Sperlari s.r.l. and Hershey. In this Complaint and in an Amended Complaint filed on February 23, 1994, Dayhoff asserted numerous claims arising from the termination of the two Frutteto contracts. Dayhoff alleged breach of contract claims against Heinz Dolciaria and Sperlari s.r.l. Dayhoff also asserted that H.J. Heinz, Heinz Italia, Sperlari s.r.l.

and Hershey had tortiously interfered with the two Frutteto contracts by inducing a breach of those contracts.

All defendants moved to dismiss Dayhoff's claims relating to the 1989 License Agreement and the 1990 Frutteto Distribution Agreement based on the arbitration provision and forum selection clause in those contracts. By an Opinion and Order dated October 3, 1994, the District Court granted this motion and dismissed all claims asserted by Dayhoff relating to the 1989 License Agreement and the 1990 Frutteto Distribution Agreement. The District Court concluded that the arbitration clause and forum selection provision should apply not only to the claims asserted against Heinz Dolciaria, but also to the claims against the non-signatory defendants:

> Although Heinz, Heinz Italia, Sperlari s.r.l. and Hershey are not parties to the Agreements, their conduct is so closely related to the contractual relationship between Heinz Dolciaria and Dayhoff that we find that the forum selection clause applies to all Defendants.

October 3, 1994 Opinion, at App. 54a. In dismissing Dayhoff's claims against the non-signatories to the agreements, the District Court expressly relied upon the decision of the United States Court of Appeals for the Ninth Circuit in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). October 3, 1994 Opinion, at App. 54a.

In an opinion issued on June 24, 1996, a panel of the Third Circuit Court of Appeals reversed the District Court's holding that the arbitration clause in the 1989 License Agreement and the forum selection clause in the

1990 Frutteto Distribution Agreement applied to Dayhoff's claims against the non-signatory defendants. The panel reasoned that under the decisions of the Court of Appeals and the United States Supreme Court in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995), "the arbitration clause in the 1989 Licensing Agreement and the forum selection clause in the 1990 Distribution Agreement can be enforced only by the signatories to those agreements." *Dayhoff*, 86 F.3d at 1296; App. 22a. The panel acknowledged that the Ninth Circuit in *Manetti-Farrow* had applied a forum selection clause to claims against non-signatories in a very similar case, but stated that "we decline to follow the reasoning of the Court of Appeals for the Ninth Circuit in *Manetti-Farrow.*" *Id.*; App. 22a.

On July 5, 1996, petitioners filed with the Court of Appeals a timely Petition for Rehearing and/or Rehearing in Banc, arguing that the June 24, 1996 panel opinion conflicted with previous panel opinions of the Third Circuit. Petitioners cited three previous decisions in which Third Circuit panels had applied arbitration and/or forum selection clauses to claims against non-signatories. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121-22 (3d Cir. 1993); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985); *Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203-04 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983). By order dated July 24, 1996, the panel granted the petition for rehearing solely for the purpose of amending the original panel opinion. App. 40a. The Court of Appeals denied the petition for rehearing in banc by order dated July 24, 1996. App. 44a.

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS DIRECTLY WITH THE HOLDING OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN *MANETTI-FARROW, INC. v. GUCCI AMERICA, INC.*

As the Third Circuit panel explicitly recognized in their opinion, the panel decision in this case is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). The fact situation presented by *Manetti-Farrow* is strikingly similar to that presented by this case. On these same facts, the Ninth Circuit held that a forum selection clause should apply to claims for tortious interference with contract asserted against non-signatories.[2]

Manetti-Farrow involved claims arising out of the termination of the North American distributor of Gucci Accessories. The distribution agreement between the North American distributor and a Gucci Italian affiliate (Gucci Parfums) included a forum selection clause requiring litigation of "any controversy regarding interpretation or fulfillment of the present contract" in Italy. *Manetti-Farrow*, 858 F.2d at 511. Following its termination, the North American distributor commenced litigation in the United States against Gucci Parfums, its Italian parent

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[2] Federal law governs the interpretation and enforcement of a forum selection clause in diversity actions. *Manetti-Farrow*, 858 F.2d at 512-13. *Accord Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995).

(Guccio Gucci), an American Gucci affiliate (Gucci America), and various individual employees and directors of the corporate defendants. The North American distributor asserted a variety of claims against these defendants, including tortious interference with contractual relations.

The North American distributor argued that the forum selection clause should not apply to its tort claims, including particularly those claims being asserted against parties other than Gucci Parfums who were not parties to the forum selection clause. The District Court rejected this argument, and the Court of Appeals affirmed. The Court of Appeals concluded first that the forum selection clause did apply to the tort claims being asserted by the North American distributor. The court stated that "[w]hether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Id.* at 514. The Court of Appeals concluded that all of the North American distributor's claims did require interpretation of the contract and hence fell within the scope of the forum selection clause. The Court of Appeals further concluded that the forum selection clause applied to all defendants, even those who were not parties to the forum selection clause. The Court of Appeals reasoned that "the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants." *Id.* at 514 n.5.

Under the reasoning of the Ninth Circuit in *Manetti-Farrow,* the District Court here properly concluded that all of Dayhoff's claims relating to the 1989 License Agreement and the 1990 Frutteto Distribution Agreement should be dismissed. Dayhoff's principal claim against

defendants Hershey, H.J. Heinz and Heinz Italia is that these defendants tortiously interfered with Heinz Dolciaria's performance of the 1989 License Agreement and the 1990 Frutteto Distribution Agreement by inducing a breach of those agreements. Because this claim will require proof that Dayhoff's termination was in breach of those agreements, this claim unquestionably will raise issues of contract interpretation, which under the agreements must be adjudicated in Italy under Italian law. Furthermore, given the nature of Dayhoff's allegations of tortious interference by H.J. Heinz, Heinz Italia and Hershey, here, as in *Manetti-Farrow*, "the alleged conduct of non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants." *Manetti-Farrow*, 858 F.2d at 514 n.5.

The Court of Appeals for the Third Circuit, however, "decline[d] to follow the reasoning of the Court of Appeals for the Ninth Circuit in *Manetti-Farrow*." *Dayhoff*, 86 F.3d at 1296; App. 22a. Instead, the Court of Appeals held that the forum selection clause at issue in this case could "be enforced only by the signatories to those agreements." *Id.*; App. 22a. Thus, as the Third Circuit explicitly recognized, its decision in this case is squarely at odds with the decision of the Court of Appeals for the Ninth Circuit in *Manetti-Farrow*.

II. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE ALSO CONFLICTS WITH DECISIONS OF THE COURTS OF APPEALS FOR THE FOURTH AND ELEVENTH CIRCUITS.

Not only does the Third Circuit panel decision in this case conflict with the decision of the Ninth Circuit in *Manetti-Farrow,* the panel opinion also conflicts with decisions of the Fourth and Eleventh Circuits. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *cert. denied,* 115 S. Ct. 190 (1994); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988). In both of these cases, the courts of appeals held that arbitration provisions in commercial agreements applied to claims against non-signatories for tortious interference with those agreements.

Rhone involved an action by an American importer against Rhone Poulenc Textile, S.A. ("Rhone") and four of its affiliated corporations. The American importer had entered into exclusive distribution agreements with each of the Rhone affiliates. The American importer brought an action against Rhone alleging, among other things, that Rhone had tortiously interfered with the importer's distribution agreements with the four Rhone affiliates by causing the affiliates to terminate the agreements. The importer's agreements with the affiliates contained arbitration provisions. The Court of Appeals held that the arbitration provisions applied to the importer's claims against Rhone, even though Rhone was not a party to the distribution agreements:

> When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may

> refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement. As the Fifth Circuit explained under similar circumstances, "If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."

Rhone, 863 F.2d at 320-21 (quoting *Sam Reisfeld & Son Import Co. v. S.A.E. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976)).

The Court of Appeals for the Eleventh Circuit reached a similar result in *Sunkist*. That case involved an agreement under which Sunkist Growers, Inc. ("SGI") had licensed the use of the "Sunkist" brand name to Sunkist Soft Drinks ("SSD"). After Del Monte Corporation acquired the stock of SSD, SGI asserted a claim against Del Monte for tortious interference with contractual relations, claiming that Del Monte had interfered with the license agreement between SGI and SSD. The license agreement included an arbitration provision. The Court of Appeals held that the arbitration provision applied to the claims against Del Monte, even though Del Monte was not a party to the arbitration provision. The court concluded that the claims against Del Monte were "intimately founded in and intertwined with" the license agreement. *Sunkist*, 10 F.3d at 758. For this reason, the court held that the claims were subject to the arbitration provision.

III. THE COURT OF APPEALS MISCONSTRUED AND DRASTICALLY INCREASED THE REACH OF THIS COURT'S HOLDING IN *FIRST OPTIONS OF CHICAGO, INC. v. KAPLAN.*

In refusing to follow the Ninth Circuit's reasoning in *Manetti-Farrow,* the Court of Appeals cited as "the controlling precedent" this Court's decision in *First Options of Chicago v. Kaplan,* 115 S. Ct. 1920 (1995), along with the decision of the Court of Appeals for the Third Circuit in that same case, *Kaplan v. First Options of Chicago,* 19 F.3d 1503 (3d Cir. 1994). The Court of Appeals, however, extended the reach of *Kaplan* far beyond this Court's narrow holdings in that case. Moreover, the Court of Appeals' decision is contrary to this Court's long-held view – which was reiterated in *Kaplan* – supporting an expansive interpretation of arbitration agreements.

The facts of *Kaplan* may be summarized as follows: Manual K. Kaplan was President, director and sole shareholder of M.K. Investments, Inc. ("MKI"). *Kaplan,* 19 F.3d at 1506. The case arose from a dispute between Mr. and Mrs. Kaplan and First Options, Inc. ("First Options") as to whether Mr. and Mrs. Kaplan had personal liability for certain obligations owed by MKI to First Options. In 1988 the parties had entered into a "workout" which purported to relieve the Kaplans of further personal liability for MKI's obligations. *Id.* at 1506-07. As part of that workout, four separate contracts were executed. Only one of those contracts – a Subordinated Loan Agreement executed by First Options, MKI and a separate entity – included an arbitration clause. The Kaplans personally did not sign any arbitration agreement.

When disputes arose concerning the workout, First Options commenced an arbitration proceeding. The arbitrators imposed personal liability on the Kaplans for the entire amount of MKI's obligations to First Options, which exceeded $6 million. *Id.* at 1508. The District Court affirmed the arbitration award. The Court of Appeals reversed, finding that the arbitrators had no jurisdiction to adjudicate the claim against the Kaplans in their individual capacities. This Court then granted certiorari to decide two specific issues relating to the standards of review to be applied by the district courts and the courts of appeals in reviewing decisions arising from arbitrations. *Kaplan,* 115 S. Ct. at 1922. This Court affirmed the Court of Appeals on both of those narrow issues.

Although the Court of Appeals in this case relied heavily on the decisions of this Court and the Court of Appeals in *Kaplan,* the decisions in *Kaplan* do not control the result in this case. *Kaplan* involved different legal issues and different factual circumstances from those presented here.

First, this Court's decision in *Kaplan* addresses solely two questions relating to standards of review to be applied by district courts and courts of appeals. *Kaplan,* 115 S. Ct. at 1922. This Court explicitly stated that the Court of Appeals' "ultimate conclusion that the merits of the Kaplan/First Options dispute were not arbitrable" was "beyond the scope of the questions we agreed to review." *Id.* at 1926. Accordingly, the narrow holdings of this Court in *Kaplan* do not control this case.

More generally, even in the Court of Appeals, *Kaplan* simply did not present the issue now before this Court. In *Kaplan,* Mr. and Mrs. Kaplan did not agree to arbitration

of *any* disputes involving their agreement with First Options. Here, by contrast, Dayhoff explicitly agreed to adjudicate all claims relating to the 1989 License Agreement and the 1990 Frutteto Distribution Agreement in Italy under Italian law. Unlike *Kaplan*, where the issue was whether Mr. and Mrs. Kaplan had agreed to arbitrate any claims, the issue here is the scope of the arbitration and forum selection clauses entered into by Dayhoff. Both this Court and the Court of Appeals in *Kaplan* recognized that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Kaplan*, 115 S. Ct. at 1924; 19 F.3d at 1512.

In essence, the Court of Appeals seized on general dicta in *Kaplan* about the underlying contractual nature of arbitration to fashion a rigid, absolute rule that arbitration and forum selection clauses apply only to disputes between signatories. Nothing in *Kaplan* compels such a rule.[3]

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[3] The Third Circuit's concern that in enforcing the forum selection clauses in relation to the non-signatories, "Hershey (as well as the other non-signatories to the agreement) has the option to accept or reject the arbitration and forum selection clauses, while Dayhoff, under the district court's opinion, is compelled to accede to Hershey's wishes" (86 F.3d at 1296-97; App. 23a.) is easily answered. Both H.J. Heinz and Hershey consented to the jurisdiction of the contract forums for purposes of adjudicating the claims against these entities alleged in Dayhoff's Amended Complaint. Moreover, Dayhoff specifically agreed that all claims arising from or relating to the 1989 License Agreement and the 1990 Frutteto Distribution Agreement should be adjudicated in Italy under Italian law, and "[i]t is not unreasonable or unjust to enforce the clause[s]" in such circumstances. *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (Transamerica

IV. THE DECISION OF THE COURT OF APPEALS OPENS A PATH FOR PARTIES TO EVADE FORUM SELECTION CLAUSES.

Contractual arbitration provisions and forum selection clauses have been used with increasing frequency in recent years. Parties find these provisions to be a useful means of contractually allocating certain risks and avoiding litigation over the proper forum for a dispute. This is particularly important in international commercial agreements, given the differences in various nations' legal systems. For these reasons, U.S. statutory and case law generally looks favorably upon such agreements. *See* 9 U.S.C. §§ 1-16 (Federal Arbitration Act); 9 U.S.C. §§ 201-08 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *The Bremen v. Zapata Off Shore Co.*, 407 U.S. 1 (1972) (enforcing forum selection clause in international commercial contract).

Although a party may see the wisdom of an arbitration or forum selection clause at the time of contracting, when a dispute arises that same party may be much more interested in litigating in the forum that is most favorable to that party's claim. The American jury trial is probably the world's most attractive forum for many plaintiffs. Consequently, it is not surprising that many American plaintiffs seek to avoid contractual provisions that require arbitration or litigation outside the United States.

Corporation and individual defendants did not object to being governed by forum selection clause, and all had agreed to submit to the jurisdiction of the Swiss courts).

Undoubtedly, many plaintiffs will construe the panel opinion in this case as presenting a broad path to circumvent an arbitration or forum selection clause. Through the simple expedient of pleading a tortious interference claim against an affiliate of the contracting party, plaintiffs will argue that they can reach their goal of an American jury trial, notwithstanding a contractual provision requiring arbitration or litigation overseas.

This case illustrates how arbitration and forum selection clauses can be circumvented if parties are permitted to assert tortious interference claims against non-signatories. From the outset of this litigation, the gravamen of all of Dayhoff's claims has been that its contracts with Heinz Dolciaria were wrongfully terminated. The Court of Appeals has now made it clear that Dayhoff cannot pursue its breach of contract claims against Heinz Dolciaria in the United States because of the arbitration and forum selection clauses in the contracts. To date, however, Dayhoff has not initiated arbitration or litigation proceedings against Heinz Dolciaria in Italy. Indeed, it may well be that Dayhoff will never pursue these contractual remedies. Instead, Dayhoff will attempt to obtain the same relief by litigating its tortious interference claims in the United States against Heinz Dolciaria's affiliates. Resolution of these tortious interference claims will turn on the issue of whether Dayhoff's termination constituted a breach of the 1989 License Agreement and the 1990 Frutteto Distribution Agreement – the same issue that the parties to those contracts agreed to have adjudicated in Italy under Italian law. In this fashion, Dayhoff in effect has sidestepped the arbitration and forum selection clauses and obtained an American forum for its claims,

notwithstanding its express agreement to adjudicate claims relating to these agreements in Italy.

This Court should not tolerate this blatant attempt to avoid a party's promise to adjudicate disputes in a foreign forum. The Court should grant certiorari and clarify that forum selection clauses may not be circumvented in this manner.

V. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE TO LITIGANTS AND COURTS THROUGHOUT THE NATION.

Given the increased use of arbitration and forum selection clauses by contracting parties, litigation over the scope of such clauses has become commonplace in the courts. As explained above, the Court of Appeals' decision here opens up a new avenue for evading forum selection clauses, and plaintiffs surely will attempt to exploit that opportunity. The conflict among the circuits on this issue of course will lead to uncertainty among the courts and litigants – and much litigation to resolve the issue on a case-by-case and circuit-by-circuit basis. Indeed, given the Court of Appeals' reliance on this Court's decision in *Kaplan*, even litigants in the Fourth, Ninth and Eleventh Circuits may perceive an opportunity to attempt this tactic in order to avoid a forum selection clause, notwithstanding the pre-*Kaplan* authority in those circuits applying forum selection clauses to tortious interference claims against non-signatories. In sum, absent intervention by this Court to resolve this important issue, there promises to be litigation throughout the country as to whether a forum selection clause applies to tortious

interference claims against non-signatories. For this reason, the Court should grant certiorari in order to clarify the law on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Filed June 24, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3404 and 96-3250

DAYHOFF INC.,
a California corporation;
Appellant

v.

H.J. HEINZ CO., a Pennsylvania corporation; HEINZ ITALIA S.p.A., an Italian corporation; HEINZ DOLCIARIA S.p.A., formerly known as SPERLARI S.p.A., an Italian corporation; SPERLARI s.r.l., an Italian corporation; and HERSHEY FOODS CORPORATION, a Delaware corporation.

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil Action No. 93-cv-01794)

Argued May 10, 1996

BEFORE: GREENBERG, ALITO, and MCKEE,
Circuit Judges

(Filed: June 24, 1996)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I. INTRODUCTION

Appellant Dayhoff, Inc. initiated this diversity of citizenship action on October 29, 1993, alleging breach of contract, tortious interference with contract, fraud, and civil conspiracy against various of the appellees. The action arose out of the termination of three contracts between Dayhoff and appellee Heinz Dolciaria S.p.A. involving the manufacture and sale of candies in the United States. The terminations followed the sale of the Heinz Dolciaria candy business to appellee Hershey Foods Corporation. The district court dismissed Dayhoff's claims related to two of the contracts because of arbitration and forum selection clauses, and dismissed all claims for lack of personal jurisdiction against appellee Heinz Italia S.p.A. Heinz Italia is the parent corporation of Heinz Dolciaria and, in turn, is a subsidiary of appellee H.J. Heinz Co. After additional discovery with respect to the third contract, the court granted appellees' motion for summary judgment on all remaining claims. After Dayhoff appealed, the district court directed entry of a final

judgment under Fed. R. Civ. P. 54(b), and Dayhoff then appealed again. We have consolidated the appeals for disposition in this opinion.[1]

Dayhoff is a California corporation with its principal place of business in California. H.J. Heinz Co. is a Pennsylvania corporation with its principal place of business in Pennsylvania. Hershey Foods Corporation is a Delaware corporation with its principal place of business in Pennsylvania. Appellees Heinz Italia S.p.A., Heinz Dolciaria S.p.A., and Sperlari s.r.l. are Italian corporations, with their principal places of business in Italy. As the monetary threshold for diversity jurisdiction was met, the district court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. FACTUAL BACKGROUND

1. *The License Agreement*

Dayhoff Australia Pty, Ltd., and Sperlari S.p.A. entered into a License Agreement on October 19, 1989,

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[1] The district court entered the order under Rule 54(b) after we questioned whether it had entered a final judgment because of a counterclaim by Heinz Dolciaria that appeared to be outstanding. In light of this order, we are satisfied that we have jurisdiction over the appeals. We also note that in the course of our opinion we make reference to a sealed appendix. This appendix was sealed because it contained certain sensitive commercial materials, but the items to which we refer are not of that character.

pursuant to which Sperlari S.p.A. granted Dayhoff Australia the exclusive license to make and sell Frutteto candy in the United States as of June 1990. Dayhoff Australia has assigned its rights and obligations under the agreement to Dayhoff. The ten-year term of the License Agreement expires October 19, 1999, but the agreement permits Dayhoff to continue thereafter to manufacture and market Frutteto candy in the United States under a non-exclusive, royalty-free license. Article 21 of the agreement provides that Italian law will govern its interpretation and Article 22 provides that any disputes relating to it will be adjudicated in an arbitration proceeding in Italy:

> 22. *ARBITRATION*
>
> All controversies arising from the present contract or relating to the same will be definitively settled according to the Reconciliation and Arbitration Rules of the International Chamber of Commerce, excluding recourse to the common law courts, by one or more arbitrators appointed in accordance with these Rules.
>
> The arbitration tribunal will decide on its competence to decide the matter and on the validity of the arbitration clause.
>
> Each party can apply to the relevant Law Courts to confirm the arbitration sentence or enforce execution of the same.
>
> Arbitration proceedings will take place in Milan.

App. at 46.

2. *The Frutteto Distribution Agreement*

On July 26, 1990, Dayhoff and Sperlari S.p.A. signed the Frutteto Distribution Agreement, which provides that Dayhoff will be the exclusive United States distributor of Frutteto candy. The contract does not have a set term, but, like the License Agreement, contains a governing law clause:

> B. GOVERNING LAW
>
> This Agreement shall be governed and constructed in accordance with the laws of Italy and the parties hereto irrevocably submit to the exclusive jurisdiction of the Court of Cremona (Italy).

App. at 49. In April 1992, Sperlari S.p.A. assigned its rights under the 1989 Frutteto Licensing Agreement and the 1990 Frutteto Distribution Agreement to Heinz Dolciaria. App. at 198.

3. *The Bulk Candy Distribution Agreement*

Dayhoff and Heinz Dolciaria executed the Bulk Candy Distribution Agreement on July 17, 1992. Pursuant to this agreement, Dayhoff became Heinz Dolciaria's exclusive United States distributor of certain candies other than Frutteto candy. The Bulk Candy Distribution Agreement has an eight-year term that expires at the earliest on July 17, 2000. The agreement provides that disputes arising from it are to be litigated in the United States District Court for the Western District of Pennsylvania and that the agreement will be construed in accordance with Pennsylvania law. App. at 50-67. Thus, the

three agreements provide for three different fora for adjudicating disputes and provide for the law of two countries to apply to their interpretation. As we shall see, this fractured approach to dispute resolution under related contracts has led to great expense and confusion and, we are afraid, will continue to do so.

Because some of Dayhoff's claims are based on events surrounding the negotiation of the 1992 Distribution Agreement, the facts relating to the negotiation of that agreement require further discussion. The district court rejected Dayhoff's claims related to this agreement on summary judgment; therefore, we will present the facts pertaining to these claims in the light most favorable to Dayhoff. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230-32 (3d Cir.), *cert. denied*, 114 S.Ct. 554 (1993); *see also Berner Int'l Corp. v. Mars Sales Co.*, 987 F.2d 975, 978 (3d Cir. 1993).

The parties negotiated the Bulk Candy Distribution Agreement through numerous facsimiles between the United States and Italy. On June 4, 1992, Luigi Volta, then a long-time employee of Heinz Dolciaria and currently employed by Sperlari s.r.l., a successor corporation to Heinz Dolciaria, informed Dayhoff that "[t]his is our last and final proposition." Sealed app. at 1011-12. On June 8, 1992, Volta informed Dayhoff that an agreement was "reachable" and invited Uday Lele, president of Dayhoff, to come to Cremona, Italy, to "finalize" the agreement. *Id.* at 1013.

Shortly thereafter, Lele traveled to Cremona to sign the agreement. According to Dayhoff, Lele understood that the negotiations were virtually over and that the

contract terms would follow the facsimiles. However, when he arrived in Italy to sign the contract, Lele learned that Antonella Giacobone, an attorney for Heinz Italia, would be at the meeting, as would Volta and Franco Seletti. Seletti, also a former employee of Heinz Dolciaria, now employed by Sperlari s.r.l., is above Volta in the corporate ladder.

Lele never had met or dealt with Giacobone, and there had never been an attorney present during previous negotiations between Dayhoff and Heinz Dolciaria or their predecessors, or at the execution of their previous contracts. Lele had not been given advance notice that Giacobone would be at the meeting, and no one had suggested that he might want to bring his own lawyer. Dayhoff alleges that when Lele asked Giacobone why she was present, she advised him that she would protect Dayhoff's interests as well as those of Heinz Dolciaria, and that she was Dayhoff's de facto attorney in connection with the negotiation of the contract.

At the meeting, Giacobone presented Lele with a draft of the Bulk Candy Distribution Agreement that he had not seen during the parties' previous negotiations. The draft contained a termination provision similar to section 14.3,[2] the one ultimately incorporated into the

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[2] Section 14.3.

Either party shall have the right to terminate this Agreement upon written notice to the other party in the event that the other party becomes bankrupt, insolvent, or goes into liquidation, or in the event that either party assigns the whole or any substantial part

final agreement. According to Dayhoff, Heinz Dolciaria had not discussed the termination provision with it previously. Thus, the provision had not been incorporated in the parties' prior drafts or agreements.

At his deposition, Lele testified that he inquired into the meaning of this provision at the meeting:

> I asked Antonella Giacobone what this meant, and she said, Mr. Lele, you are operating in the American market. Heinz USA is one of the most well-known food companies, we don't want you to use the Heinz name to sell your company to somebody else and become a rich man and we get left holding the baby and having to deal with somebody we don't want to deal with. That is what she told me.

Sealed app. at 743-44. Dayhoff alleges that when Lele asked Giacobone specifically what the termination provision meant, she did not tell him that the appellees could invoke the clause when Heinz Italia rather than Dayhoff sold its business. Instead, Dayhoff alleges, she advised him that the provision protected Heinz Dolciaria in the event that Dayhoff was sold or its assets assigned. Moreover, Dayhoff alleges that in connection with Giacobone's explanation of the clause, she told Lele that "[s]he would be taking care of both our interests." Br. at 9. Dayhoff further claims that Volta confirmed Giacobone's representations as to the meaning of the termination clause by telling Lele that the provision was intended to protect

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> of its business or assets or merges with another company or undergoes a change of control.

Sealed app. at 969.

Heinz Dolciaria in the event that Dayhoff sold or assigned its assets to another company.

Dayhoff thus asserts that no one informed Lele that the clause would entitle Heinz Dolciaria to terminate the contract without compensation in the event that Heinz Dolciaria underwent a change of control or sold its assets. Indeed, Dayhoff claims that explanatory statements to Lele by Giacobone and Volta were inconsistent with such an interpretation. Dayhoff states that Lele understood the agreement to mean that Heinz Dolciaria would not have the right to terminate the contract if Heinz Dolciaria sold or transferred its assets to another corporation.

Dayhoff claims that only after it initiated this litigation did the appellees assert that the termination clause entitled Heinz Dolciaria to terminate the contract without compensation when Heinz Italia sold the confectionery business. Giacobone then testified that she had included the clause for this specific purpose. At her deposition, Giacobone further claimed that she "intended to cover every possible . . . legal or financial way in which our [Heinz Italia's] confectionery business could be sold. . . ." Sealed app. at 1032-33. Dayhoff claims that Giacobone did not deny, however, that she failed to disclose this information when Lele specifically questioned the meaning of section 14.3.

4. *Performance of the Three Contracts*

Dayhoff consistently performed its obligations under the three contracts and created a market for Heinz Dolciaria's candies in the United States. Dayhoff claims to

have invested more than $1.6 million in performing the contracts. As proof of its satisfactory performance, Dayhoff asserts that as recently as September 30, 1993, Heinz Dolciaria asked Dayhoff to expand its operations to distribute additional Heinz Dolciaria candies. Dayhoff expected enormous financial returns from its substantial investment.

5. *Termination of the Three Contracts*

According to Dayhoff, as early as March 1993, H.J. Heinz and Heinz Italia, without Dayhoff's knowledge, began negotiating the sale of Heinz Dolciaria's business to Hershey. Dayhoff alleges that when it learned about this impending transaction and inquired as to its effect on its contracts, Heinz Dolciaria assured it that there would be no effect and that there was no reason to terminate the contracts. Yet, according to Dayhoff, H.J. Heinz, Heinz Italia, and Hershey even then were searching for ways to terminate the contracts. On September 13, 1993, Giacobone sent a letter to Hershey discussing the contracts in detail with particular reference to the termination provisions. The letter indicated that Lele was "well known and appreciated" by Sperlari S.p.A.'s (*i.e.*, Heinz Dolciaria's) sales managers. Sealed app. at 59- 60.

On September 14, 1993, Heinz Italia sold virtually all of its confectionery business to Hershey Holding Company, a subsidiary of Hershey Foods Corporation, for $133,000,000. Heinz Italia accomplished the sale through the formation of a new company, Sperlari s.r.l.; the transfer of substantially all the assets and liabilities of the confectionery business to Sperlari s.r.l.; and the sale of

Sperlari's stock to Hershey Holding Company.[3] As a condition of that sale, Hershey insisted on termination of the Dayhoff contracts, and thus when Hershey purchased the confectionery business the Dayhoff contracts were not included. The closing memorandum of the sale shows that Hershey's purchase did not include the contracts, Heinz Italia agreed to terminate the Dayhoff contracts, and Heinz Italia agreed to indemnify Hershey from any liabilities arising from the termination of the contracts. Sealed app. at 940-41.

According to Dayhoff, Seletti deliberately decided to conceal the termination decision from it. Hence, Dayhoff claims that it was not informed of the termination and continued to devote itself exclusively to the promotion of the Sperlari name and products and continued to inform Seletti and Volta of its efforts. Dayhoff alleges that, even as Lele was invited to visit Milan to discuss the parties' continuing business relationship and the extension of the Bulk Candy Distribution Agreement to include additional candies, Seletti and Volta were providing Hershey with confidential information concerning Dayhoff's business.

By letter dated September 28, 1993, at Hershey's direction and insistence, Heinz Italia issued a letter terminating Heinz Dolciaria's three contracts with Dayhoff:

> As you may have heard, we recently sold all our confectionery business to the Hershey Group. As a consequence, we hereby notify you [of] our

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[3] Sperlari S.p.A. (the original party to the 1989 and 1990 Frutteto Agreements) is not the same company as Sperlari s.r.l. *See Dayhoff, Inc. v. H.J. Heinz Co.*, No. 93-1794, slip op. at 4 n.2 (W.D.Pa. Oct. 3, 1994).

> decision *to forthwith terminate* the [License Agreement, Frutteto Distribution Agreement, and Bulk Candy Distribution Agreement]. The Frutteto Distributorship and the Bulk Candies Distributorship are terminated also for your failure to attain respectively the Minimum Quantities and the Minimum Purchases.

Sealed app. at 950 (emphasis in original). Dayhoff notes that Heinz Italia did not mention section 14.3 of the Bulk Candy Distribution Agreement in the September 28, 1993 termination letter.

Giacobone called Volta after she saw the September 28, 1993 termination letter to express her concern regarding Dayhoff's likely reaction. Volta assured Giacobone that there was no problem with terminating the Bulk Candy Distribution Agreement because of the contract's termination provision. On the other hand, Volta expressed concern that there was no justification for terminating the Frutteto Distribution Agreement. Dayhoff alleges that at that time Giacobone reassured Volta by reminding him of the contract clause providing for an Italian forum, and stating that Dayhoff might not be willing to pursue its rights in Italy. Sealed app. at 1101-04. Dayhoff reacted to the termination letter by informing Heinz Dolciaria that the purported terminations were invalid and had no effect because there were no grounds for the terminations and because Heinz Italia, which was not a party to the contracts, could not terminate them.[4]

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[4] Dayhoff alleges that after this litigation commenced, Heinz Dolciaria attempted to terminate the contracts itself by sending two more, "equally ineffective," letters, which cited section 14.3 as the basis for termination. *See* br. at 13 n.2.

Since the termination, Hershey has announced to Dayhoff's customers that Hershey soon would begin selling candies in the United States where Dayhoff has exclusive United States rights. As a result, Dayhoff claims that its sales have declined dramatically and its standing in the United States candy market has been shattered.

B. PROCEDURAL HISTORY

Dayhoff initiated this action on October 29, 1993. In its amended complaint, Dayhoff alleged claims against Heinz Dolciaria for breach of all three contracts. Dayhoff also asserted breach of contract claims against Sperlari s.r.l. on the ground that it took over Heinz Dolciaria's business when Heinz Dolciaria effectively was stripped of its assets. Dayhoff does not assert breach of contract claims against Hershey, H.J. Heinz, or Heinz Italia. Dayhoff, however, asserts claims for tortious interference with contract against all appellees except Heinz Dolciaria. Dayhoff asserts claims against all appellees for fraud and conspiracy, and seeks the imposition of a constructive trust on all proceeds from the sale of Heinz Italia's confectionery business and all proceeds from the manufacture and sale of Heinz Dolciaria or Sperlari s.r.l. candies in the United States. It also seeks restitution from Hershey, Sperlari s.r.l., and Heinz Dolciaria, and reformation of the change of control termination provision of the Bulk Candy Distribution Agreement. Dayhoff Australia originally was a plaintiff in the suit; however, Dayhoff Australia prior to the institution of the suit had transferred and assigned to Dayhoff its rights under the 1989 License Agreement. Thus, it was dropped as a plaintiff.

On March 14, 1994, the appellees made a joint motion to dismiss or for summary judgment. On October 3, 1994, the court, through Judge Ambrose, dismissed Dayhoff's claims relating to the License Agreement on the ground that the agreement compelled Dayhoff to arbitrate all claims arising from it against all appellees, including those who had not signed it. The district court also dismissed all of Dayhoff's claims relating to the Frutteto Distribution Agreement on the ground that Dayhoff was compelled to litigate those claims in the courts of Cremona, Italy. Finally, the district court dismissed all claims against Heinz Italia for lack of personal jurisdiction. Thus, this initial disposition left outstanding only Dayhoff's claims under the Bulk Candy Distribution Agreement against the appellees other than Heinz Italia.

The case then was transferred to Judge Cindrich, who, on July 10, 1995, granted summary judgment in favor of the appellees on Dayhoff's remaining claims related to the Bulk Candy Distribution Agreement. Dayhoff then appealed. We are exercising plenary review.

We note that insofar as we are aware, notwithstanding the October 3, 1994 order, the parties have not instituted arbitration or litigation proceedings in Italy. Dayhoff claims that Hershey, Sperlari s.r.l., and H.J. Heinz did not consent to jurisdiction of the arbitration in Milan or litigation in the courts of Cremona until after the district court conditioned its dismissal of Dayhoff's claims on that consent. Dayhoff's consent neither was sought nor given.

III. DISCUSSION

A. THE 1989 AND 1990 AGREEMENTS

Dayhoff's initial argument is that the district court erred in dismissing its claims related to the 1989 and 1990 Frutteto agreements because, in Dayhoff's view, the arbitration and forum selection clauses of those agreements, on which the district court relied in reaching its result, do not apply to all of the appellees and, indeed, are not effective at all. Dayhoff bases its argument that the clauses are not effective as to all the appellees principally on our opinion in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), which the Supreme Court affirmed in *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995).[5]

Dayhoff asserts that the Supreme Court's opinion in *Kaplan* strongly emphasized that parties cannot be required to arbitrate a dispute unless they specifically and expressly have agreed to arbitration. It claims that the district court's holding that Dayhoff was required to arbitrate its claims with Hershey under the License Agreement because that was "reasonable," even though Hershey was not a party to the contract, was erroneous and inconsistent with Kaplan. Dayhoff further claims that in crafting its standard of reasonableness, the district court ignored the threshold issue of whether it is proper,

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[5] Even though the 1989 and 1990 agreements provide for Italian law to govern disputes over the agreements and for Italian fora for resolution of the disputes, no party suggests that Italian law should be considered with respect to the issues under the arbitration and forum selection clauses. Thus, we do not address that possibility.

as a matter of law, to compel Dayhoff to arbitrate its claims against Hershey, a stranger to the License Agreement, where Dayhoff has not agreed to arbitrate with Hershey. Dayhoff asserts that *Kaplan* unequivocally held that such compulsion is improper where, as here, there is no agreement to arbitrate between the relevant parties.

In *Kaplan*, the Supreme Court affirmed our decision directing the district court to vacate an arbitration award against a party who had not agreed to arbitrate. 115 S.Ct. at 1926. Exercising *de novo* review, we held that the Kaplans could not be compelled to arbitrate claims made pursuant to various contracts because they individually had not signed the specific contract containing the arbitration clause, although they had signed related contracts. *Kaplan*, 19 F.3d at 1516.

The Kaplans were not obligated to arbitrate because they had not agreed to do so. As the Supreme Court wrote:

> [A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.

115 S.Ct. at 1924 (citations omitted). Further, the Court stated that:

> After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'

Id. at 1925 (citations omitted).

Dayhoff claims that *Kaplan* is particularly significant because one of the individual defendants in that case, Manuel Kaplan, was the president, director, and the sole shareholder of the defendant corporation, which was obligated to arbitrate because Kaplan had signed a contract containing an arbitration clause on its behalf. Nonetheless, Kaplan himself was not obligated to arbitrate the claims against him because he had not entered into an agreement to arbitrate individually, although he had signed related agreements. Dayhoff points out that if reasonableness or a close relationship were sufficient cause to compel a non-party to arbitrate, Kaplan would have been a prime candidate for arbitration. However, Dayhoff notes that we rejected any test for determining whether a party had to arbitrate other than a determination of what the contract's terms provided:

> Arbitration is fundamentally a creature of contract . . . 'arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.'

19 F.3d at 1512 (quoting *AT & T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418 (1986)). Dayhoff argues that *Kaplan* thus discredits the theory that as long as an arbitration clause is applicable to the contracting parties, it is proper to bring into the arbitration all of the parties to the dispute even though they are not parties to the agreement, and thus have not agreed to arbitrate. Accordingly, since Dayhoff and Hershey did not agree to arbitrate, Dayhoff asserts that it cannot be required to do so.

Further, Dayhoff notes that a year after it commenced this litigation, Hershey gave its consent to arbitration in Italy, but only after the district court had required such consent as a condition of dismissing the action against it.[6] Dayhoff claims that the very existence of this consent underscores its point that there is no legal basis for requiring either Hershey or Dayhoff to arbitrate in Italy, because the mere fact that Hershey cannot be *compelled* to do so demonstrates that Dayhoff should not be required to take its claims there either.

Dayhoff applies its arguments relating to the arbitration clause of the 1989 Licensing Agreement to the forum selection clause of the 1990 Frutteto Distribution Agreement, arguing that *Kaplan* would not countenance sending the parties to a foreign court, absent a valid agreement selecting that court. Dayhoff claims that the rationale of *Kaplan* thus governs the forum selection clause, and that Hershey's belated consent to the jurisdiction of the Italian courts is simply irrelevant, except that it shows that there was no agreement between Dayhoff and Hershey to resort to the Italian forum.

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[6]All claims which relate to the 1989 and 1990 Frutteto Agreements will . . . be dismissed. *This dismissal is qualified, however, on the condition that Hershey and Heinz agree to voluntarily appear in Italy and subject themselves to the jurisdiction of the Italian courts for the purpose of litigating the claims that may be asserted by Plaintiff relating to the 1989 and 1990 Frutteto Agreements.*

Dayhoff, Inc. v. H.J. Heinz Co., No. 93-1794, slip op. at 9 (W.D.Pa. Oct. 3, 1994) (emphasis added).

In response, appellees argue that the 1989 Licensing Agreement and the 1990 Frutteto Distribution Agreement contained, respectively, a valid arbitration clause and a valid forum selection clause. Appellees claim that the district court correctly relied on these clauses in dismissing Dayhoff's claims relating to these two agreements, and thereby acted consistently with precedent that upholds the enforceability of such clauses. Further, appellees argue that these clauses not only apply to breach of contract claims, but also to tort claims arising from contractual relations. Br. at 15. Appellees principally rely upon the decision of the Court of Appeals for the Ninth Circuit in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988).

Manetti-Farrow involved claims arising from the termination of the North American distributor of Gucci Accessories. The distribution agreement between the North American distributor and a Gucci Italian affiliate (Gucci Parfums) included a forum selection clause requiring litigation of "any controversy regarding interpretation or fulfillment of the present contract" in Italy. *Id.* at 511. Following its termination, the North American distributor commenced litigation in the United States against Gucci Parfums, its Italian parent (Guccio Gucci), an American Gucci affiliate (Gucci America), and various employees and directors of the corporate defendants. The North American distributor asserted a variety of claims against these defendants, including tortious interference with contractual relations. *Id.*

The North American distributor argued that the forum selection clause should not apply to its tort claims, particularly those claims it was asserting against parties

other than Gucci Parfums who were not parties to the forum selection clause. The district court rejected this argument, and the court of appeals affirmed. The court of appeals concluded first that the forum selection clause did apply to the tort claims asserted by the North American distributor, stating that "[w]hether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Id.* at 514. The court concluded that all of the North American distributor's claims required interpretation of the contract and therefore fell within the scope of the forum selection clause. The court further concluded that the forum selection clause applied to all defendants, even those who were not parties to the forum selection clause. It reasoned that "the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants." *Id.* at 514 n.5.

Relying upon the reasoning of the court of appeals in *Manetti-Farrow,* appellees argue that the district court correctly concluded that all of Dayhoff's claims relating to the 1989 and 1990 Frutteto agreements should be dismissed. *See Dayhoff, Inc. v. H.J. Heinz Co.,* No. 93-1794, slip op. at 9 (W.D.Pa. Oct. 3, 1994) ("Although Heinz, Heinz Italia, Sperlari s.r.l. and Hershey are not parties to the Agreements, their conduct is so closely related to the contractual relationship between Heinz Dolciaria and Dayhoff that we find that the forum selection clause applies to all Defendants."). Appellees further rely on similar decisions of other courts. *See* br. at 18 (citing *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190, 203 (3d Cir.) ("[T]he law of contracts . . . has long

recognized that third-party beneficiary status does not permit the avoidance of contractual provisions otherwise enforceable."), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349 (1983); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) (noncontracting defendants subject to forum selection clause because integrally related to contracting defendants such that suit should be kept in a single forum), *cert. denied*, 114 S.Ct. 1057 (1994); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (forum selection clause can restrict third-party beneficiary to designated forum; it is not unreasonable or unjust to enforce clause when all other defendants agree to jurisdiction in the selected forum); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988) ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.")).

Appellees claim that neither the decision of the Supreme Court nor that of this court in *Kaplan* controls the result of this case. Appellees assert that *Kaplan* involved different legal issues and different factual circumstances from those here. First, appellees read the Supreme Court's opinion in *Kaplan* narrowly, claiming that the case solely addressed two questions relating to standards of review to be applied to district court decisions by courts of appeals. More generally, however, appellees claim that the case did not present the issue before us. In particular, appellees claim that:

> Mr. & Mrs. Kaplan did not agree to arbitration of *any* disputes involving their agreement with First Options. Here, by contrast, Dayhoff explicitly agreed to adjudicate all claims relating to the 1989 Frutteto License Agreement and the 1990 Frutteto Distribution Agreement in Italy under Italian law. Unlike *Kaplan* where the issue was whether Mr. & Mrs. Kaplan had agreed to arbitrate any claims, the issue here is the scope of the arbitration and forum selection clauses entered into by Dayhoff.

Br. at 21.

We agree with Dayhoff that the arbitration clause in the 1989 Licensing Agreement and the forum selection clause in the 1990 Distribution Agreement can be enforced only by the signatories to those agreements. The opinions in *Kaplan* are the controlling precedent and thus we decline to follow the reasoning of the Court of Appeals for the Ninth Circuit in *Manetti-Farrow.* Nor do we believe any of the other cases cited by appellees are persuasive here, as those cases all may be distinguished from that before us. We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration and forum selection clauses, for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters. If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration and forum selection clauses, they should have directed Heinz Dolciaria to include appropriate language in the 1989 and 1990 agreements allowing them to do so.

Of course, we recognize that Dayhoff did agree to the arbitration and forum selection clauses, whereas in *Kaplan* the Kaplans had not agreed to any arbitration or forum selection clause. However, we find appellees' position unacceptable, in that under it Hershey (as well as the other non-signatories to the agreement) has the option to accept or reject the arbitration and forum selection clauses, while Dayhoff, under the district court's opinion, is compelled to accede to Hershey's wishes.[7] The very fact that Hershey would have such a choice belies the existence of an agreement between Dayhoff and Hershey, an agreement that purportedly lies at the basis of appellees' argument. For this reason, we will reverse the decision of the district court to dismiss all of Dayhoff's claims related to the 1989 and 1990 Frutteto agreements against the non-signatories to those agreements, except for Sperlari, s.r.l., the successor to Heinz Dolciaria.[8]

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[7] We principally consider Hershey as the briefs are written that way. Our discussion, however, applies to the other nonsignatory appellees as well, except for Sperlari s.r.l.

[8] According to the closing memorandum between Heinz Italia and Hershey, Heinz Dolciaria did not transfer the agreements between Heinz Dolciaria and Dayhoff to Sperlari s.r.l. Sealed app. at 940-41. Nevertheless Dayhoff in its amended complaint charged Sperlari s.r.l. with breach of contract and alleged that Sperlari s.r.l. "has succeeded to the contract rights and duties of Heinz Dolciaria" under the three agreements involved in this case. Of course, inasmuch as Sperlari s.r.l. relies on the arbitration and forum selection clauses as defenses in this action, we do not prejudice it by taking Dayhoff's claim as accurate to the extent that it is consistent with Sperlari's defense. We are not to be understood, however, as suggesting that Sperlari s.r.l. is in any respect a party to the three agreements involved in this case nor do we suggest that it is

Dayhoff next urges us to hold that the arbitration clause in the License Agreement and the forum selection clause in the Frutteto Distribution Agreement should not be enforced in favor of even Heinz Dolciaria or Sperlari s.r.l. Dayhoff claims that such clauses will not be enforced where " 'trial in the contractual forum will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of [its] day in court.' " Br. at 27 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S.Ct. 1907, 1917 (1972)). Dayhoff asserts that appellees seek precisely that result: to prevent it from pursuing its rights and to evade all liability for their wrongful conduct. Br. at 27.

The district court addressed these claims in its October 3, 1994 opinion. In that court Dayhoff stated, *inter*

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bound by the agreements. Rather, we do not reach these two issues.

We note that Dayhoff's pleading is not consistent with its brief, as it argues there that Sperlari s.r.l., as a nonparty to the License Agreement and the Frutteto Distribution Agreement, is barred from relying on their arbitration and forum selections clauses. Brief at 18. We do not see how Dayhoff can have it both ways so, at this point, we will hold it to its pleadings. Thus, we treat Sperlari s.r.l. as being in the same position as Heinz Dolciaria with respect to the arbitration and forum selection clauses. However, we do not preclude Dayhoff from seeking to amend the complaint in the district court to drop the breach of contract claims against Sperlari s.r.l., and to make it clear that it does not claim that Sperlari s.r.l. is bound by the agreements. In this regard, we point out that this issue might be controlled by Italian law. After all, Sperlari s.r.l. was set up in Italy and acquired the assets of Heinz Dolciaria, an Italian corporation. Furthermore, the 1989 and 1990 agreements provide that Italian law governs their interpretation.

alia, that the enforcement of the forum selection clause would be unreasonable because Italian courts would have no authority to enforce preliminary or permanent injunctive relief in the United States, and that only in the United States courts could Dayhoff receive complete, consistent, and meaningful relief. *Dayhoff, Inc. v. H.J. Heinz Co.*, No. 93-1794, slip op. at 6 (W.D. Pa. Oct. 3, 1994). After carefully reviewing these arguments, the district court found that it is not unreasonable to enforce the forum selection clauses:[9]

> The parties to the Agreements were sophisticated business people and there is no indication that Plaintiff was not aware, or could not have made itself aware, of the consequences that would result from including the forum selection clauses in the Agreements including whether the chosen forum was adequate and convenient. Simply because Plaintiff is unhappy, in retrospect, about the forum it designated is insufficient to warrant a finding that the clauses are unenforceable. It would be patently unfair to allow Plaintiff to avoid the mandates of the forum selection clauses due to inconvenience because we would merely be shifting the burden

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[9] The district court analyzed this issue as concerning two "forum selection clauses." *See Dayhoff, Inc. v. H.J. Heinz Co.*, No. 93-1794, slip op. at 6-7 (W.D. Pa. Oct. 3, 1994). While, technically, one clause concerns arbitration and only one is truly a forum selection clause, the distinction is irrelevant for our purpose of reviewing the district court's contract analysis. We note as well that the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457 (1974), characterized an agreement to arbitrate before a specified tribunal as "a specialized kind of forum-selection clause."

> of inconvenience to the other party to the Agreement, an Italian corporation. We also believe that factors which weigh heavily in favor of enforcing the forum selection clauses include the fact that the parties agreed that Italian law would govern the Agreements and that the Agreements are international in character and have, at most, a tenuous relationship to the Western District of Pennsylvania.

Id. at 7.

We agree with the district court's analysis of this issue, except that we think the agreements have more than a tenuous relationship to the Western District of Pennsylvania, as the contracts contemplate performance in the United States. But this narrow area of disagreement does not lead us to reject the district court's conclusions that the arbitration and forum selection clauses are enforceable. Therefore, we will affirm its finding that Dayhoff must litigate any claim relating to the 1989 and 1990 Frutteto agreements according to the arbitration and the forum selection clauses of those agreements. However, unlike the holding of the district court, our holding will apply only to Dayhoff's claims against Heinz Dolciaria (and its successor, Sperlari s.r.l.), because of our earlier holding that the clauses do not apply to non-signatories of the agreement.

In reaching our result on this point, we recognize that Dayhoff emphasizes it may have to litigate its claims in three different fora with three different sets of rules, and it asserts that it has "no reasonable expectation of being able to enforce its rights even after it has secured favorable rulings." Br. at 28. We are not impressed by these

arguments. While we agree with Dayhoff that it did not agree on arbitration and forum selection clauses with respect to all the appellees, it did agree to litigate with Sperlari S.p.A. and Heinz Dolciaria in three different fora. Furthermore, we do not see why, if it is successful in any forum, it could not enforce its rights, though enforcement might require ancillary litigation and the extension of comity to foreign judgments.[10] Undoubtedly, the procedural problems facing Dayhoff are daunting but Dayhoff's bargaining when it entered into the three agreements is the cause of that.

B. THE 1992 AGREEMENT

Dayhoff next asserts that the resolution of its claims regarding the unlawful termination of the Bulk Candy Distribution Agreement and the fraud that allegedly accompanied that termination centers on factual disputes, including credibility issues, and that the district court therefore should not have decided its claims relating to that agreement on a summary judgment motion. As presented by Dayhoff, the facts supporting its claim that the termination clause was included in the executed contract by fraud include the following. Heinz Dolciaria invited Lele to come to Italy for the final negotiations and execution of an agreement that he had been led to believe was essentially a "done deal." Upon his arrival, Lele was confronted with Giacobone, an attorney for Heinz Italia,

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[10] Of course, we cannot predict how this litigation will play out. We merely acknowledge that it probably will continue to be complicated.

who told him that she would be representing Dayhoff's interests as well as those of Heinz Dolciaria.

At this meeting, Lele saw the termination provision for the first time. Lele did not understand what it meant, and therefore asked Giacobone to clarify its meaning. She explained that it was there to protect Heinz Dolciaria in case Dayhoff underwent a change of control. Volta confirmed that meaning to Lele. Based upon this explanation, Dayhoff accepted the clause and devoted its energies to the exclusive distributorship provided by the contract. Giacobone subsequently testified that, contrary to what Lele claims she told him, she had put the provision in the contract so that Heinz Dolciaria could get out of the contract in the event that its business was sold. Moreover, Volta later took this position as to the meaning of the provision as well. This evidence, according to Dayhoff, supports the conclusion that there was "fraud in the execution of the contract, or at least a jury could so find after weighing the evidence and assessing credibility." Br. at 33.

In its July 10, 1995 opinion, the district court addressed these arguments in assessing the appellees' summary judgment motion regarding the 1992 agreement. The dispute revolves around section 14.3 of the agreement, the final termination clause executed by the parties, which states:

> Either party shall have the right to terminate this Agreement upon written notice to the other party in the event that the other party becomes bankrupt, insolvent, or goes into liquidation, or in the event that either party assigns the whole or any substantial part of its business or assets

> or merges with another company or undergoes a change of control.

See Dayhoff, Inc. v. H.J. Heinz Co., No. 93-1794, slip op. at 7 (W.D. Pa. July 10, 1995). The appellees have contended that this provision is straightforward and directly applicable to the situation here involved. Since a transfer of assets took place from Heinz Dolciaria to Sperlari s.r.l., whose stock Hershey acquired on September 14, 1993, appellees argue that the conditions triggering the application of section 14.3 were satisfied; that Heinz Italia's September 28, 1993 letter effectively terminated the three agreements with Dayhoff; and that all Dayhoff's claims relating to termination of the 1992 Agreement therefore are foreclosed. In response, Dayhoff relies upon its factual allegations presented above and asserts that fraud bars the termination of the 1992 Distribution Agreement.

As the district court noted, appellees point out that the 1992 Distribution Agreement contains an integration clause[11] that bars any attempt to modify the terms of the agreement by reference to pre-agreement discussions or

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[11] Section 18.1 of the 1992 agreement provides:

> This Agreement contains the entire understanding between the parties hereto with respect to the subject matter hereof. All previous documents, undertakings and agreements with respect to this subject matter, whether verbal, written, or otherwise, between the parties are hereby cancelled and shall not affect or modify any of the terms or obligations set forth in this Agreement except by written agreement between the parties.

See Dayhoff, Inc. v. H.J. Heinz Co., No. 93-1794, slip op. at 9 n.3 (W.D. Pa. July 10, 1995).

negotiations – that is, by prohibiting parol evidence. *Dayhoff, Inc. v. H.J. Heinz Co.*, No. 93-1794, slip op. at 9 (W.D. Pa. July 10, 1995). Dayhoff responds that the parol evidence rule does not apply because Heinz Dolciaria fraudulently obtained the inclusion of the termination provision. Br. at 34.

The district court correctly found that Dayhoff's argument conflicts with two recent decisions of the Pennsylvania courts, which state's law the parties agree is controlling on this issue. In *HCB Contractors v. Liberty Place Hotel Assoc.*, 652 A.2d 1278 (Pa. 1995), the appellant general contractor filed mechanics' liens against four buildings it had helped erect. Appellees, the building owners, successfully demurred to the claims on the ground that HCB in two separate provisions in the contract documents had agreed not to file such liens, instead limiting its potential recovery to the owners' interests. HCB argued on appeal that it had been induced fraudulently to sign the waiver of liens. The question on appeal was whether allegedly false oral representations could alter the express waiver of liens in the contract. The contract in question contained an integration clause.

The Supreme Court of Pennsylvania found that the parol evidence rule barred consideration of prior representations concerning matters covered in the written contract, even those alleged to have been made fraudulently, unless the representations were fraudulently *omitted from the contract*. Otherwise, the parol evidence rule " 'would become a mockery,' " *id.* at 1279 (quoting *Nicolella v. Palmer*, 248 A.2d 20 (Pa. 1968)), and integrated contracts could be avoided or modified by claims of differing prior representations.

The second decision relied upon by the district court, *1726 Cherry St. Partnership v. Bell Atlantic Properties, Inc.*, 653 A.2d 663, (Pa. Super. Ct.), *appeal denied*, 664 A.2d 976 (Pa. 1995), addressed the same issue found in *HCB* and here.[12] *1726 Cherry St.* concerned Bell's acquisition of several parcels of land. Appellants, the owners of one of the parcels, wanted theirs to be the last acquired, believing that this order of sale would bring them a better price than they otherwise would obtain. They were persuaded to sell their land sooner by the inclusion of a so-called "most favored nation" clause in the contract which retroactively would adjust their price upward if Bell acquired certain other specified parcels at higher prices. *Id.* at 664.

Bell later acquired and paid a higher price for land known as the CIGNA Parcel. The parties had not named the CIGNA Parcel in the 1726 Cherry St. contract so Bell did not consider itself bound to raise the price paid to the 1726 Cherry St. owners. The owners brought suit for fraud, reformation, or rescission, claiming that Bell orally had misrepresented its intention not to purchase the CIGNA Parcel; otherwise, they would have insisted on the inclusion of the CIGNA Parcel in the list of properties subject to most-favored-nation treatment. The trial court applied the parol evidence rule in entering judgment for Bell.

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[12] The court stated the issue in *1726 Cherry St.* as "whether the parol evidence rule precludes admission of evidence of allegedly fraudulent misrepresentations made during negotiations leading to written agreements, where the alleged misrepresentations concern a subject specifically dealt with in the agreements." *1726 Cherry St.*, 653 A.2d at 664.

The Superior Court affirmed, *1726 Cherry St.*, 653 A.2d at 670, explaining Pennsylvania's distinction between fraud in the execution and fraud in the inducement. Fraud in the execution applies to situations where parties agree to include certain terms in an agreement, but such terms are not included. Thus, the defrauded party is mistaken as to the contents of the physical document that it is signing. Parol evidence is admissible in such a case only to show that certain provisions were supposed to be in the agreement but were omitted because of fraud, accident, or mistake. Fraud in the inducement, on the other hand, does not involve terms omitted from an agreement, but rather allegations of oral representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement. It is clear that Dayhoff alleges fraud in the inducement in this case, despite its protestations to the contrary.

In seeking to distinguish *HCB* and *1726 Cherry St.*, Dayhoff argues that the facts here differ, particularly in its claim that "an attorney said something that simply was not true, and moreover, this attorney stated that she was representing Dayhoff, another untruth." Br. at 35-36. However, we agree with the district court that the differing facts here do not affect the broad holdings of *HCB* or *1726 Cherry St.* in any significant way. Alternatively, Dayhoff again asserts, as it did in the district court, that the Supreme Court of Pennsylvania has not expressly rejected fraud in the inducement as an exception to the parol evidence rule. Again agreeing with the district court, we find this argument meritless. Accordingly, because the plain terms of section 14.3 cannot be altered

by Dayhoff's factual claims of fraud in the inducement, even if Dayhoff's assertions are true, we agree with the holding of the district court that the termination provision of the 1992 Bulk Distribution Agreement is binding upon the parties. Consequently, as the termination provision is absolutely clear and is applicable here, we will affirm the summary judgment granted against Dayhoff on its claims that Heinz Italia improperly terminated the 1992 Bulk Candy Distribution Agreement.[13]

Our result on this issue also leads us to affirm the district court's judgment dismissing Dayhoff's tortious interference with contract, constructive trust, civil conspiracy, and restitution claims predicated on the termination of the 1992 agreement. There is no doubt that the conditions for the termination of the 1992 agreement were met.[14] Furthermore, Hershey did nothing wrong in requesting that the agreement be terminated. After all, it was acquiring Heinz Italia's candy business and it did not want Dayhoff as a candy distributor. There was no reason why it had to retain Dayhoff in that role, at least with respect to the 1992 agreement. Furthermore, we will not allow the claim for reformation to proceed either, as Dayhoff was well aware that section 14.3 was being included in the 1992 agreement.

Dayhoff claims, however, that appellees' fraud was not limited to the execution of the contract, but that there also was fraud when Dayhoff falsely was assured that the

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[13] As we note above, Heinz Dolciaria also terminated the agreement. *See* footnote 4, *supra*.

[14] Of course, we do not reach the questions of whether the 1989 and 1990 agreements were terminated properly.

sale to Hershey would not affect its contracts. The district court rejected that claim as well when it granted appellees summary judgment. Dayhoff relies in part on the following allegations in making this second claim of fraud. Seletti and Volta constantly reassured Lele that there was no reason to terminate Dayhoff's contracts and that the sale of Heinz Italia's confectionery business would have no effect on those contracts. Dayhoff claims that, in fact, Volta told Lele that he should not worry. Dayhoff thus claims that appellees made fraudulent statements and that the district court improperly attempted to interpret and weigh the evidence concerning these allegations. Dayhoff asserts that numerous genuine issues of fact relate to the fraudulent conduct of appellees with regard to the termination of the Bulk Candy Distribution Agreement. Dayhoff claims that these issues of fact directly relate to Dayhoff's claims for imposition of a constructive trust and for damages for civil conspiracy, tortious interference, and restitution.

We partially agree with Dayhoff. Viewing the facts in the light most favorable to it as the non-moving party, we cannot say that there are no genuine issues of material fact that a jury should evaluate in this case. Thus, in this respect, unlike the district court, we are not satisfied that summary judgment should have been granted against Dayhoff on this particular claim related to the 1992 Bulk Distribution Agreement. Therefore, we will reverse the district court's grant of summary judgment to the limited extent that it precluded Dayhoff from proceeding with its fraud claim predicated on the allegations that it was defrauded when it was assured that the sale to Hershey

would not affect its contracts with Heinz Dolciaria. However, we limit Dayhoff's possible recovery with respect to the 1992 agreement to damages, as that agreement, after all, was terminated lawfully. We otherwise will affirm the summary judgment entered on the 1992 agreement. At this time, we do not consider the effect of our reversal on claims relating to the 1989 and 1990 agreements, as the court dismissed those claims without considering them on their merits. To the extent that litigation regarding those agreements continues in the district court, the effect of the reversal may be considered on remand.

C. PERSONAL JURISDICTION OVER HEINZ ITALIA

Finally, Dayhoff disputes the district court's decision to dismiss all claims against Heinz Italia for lack of personal jurisdiction. Dayhoff notes that the transaction that serves as the predicate for all of its claims in this litigation is the $133,000,000 sale of Heinz Italia's confectionery business (Heinz Dolciaria) to Hershey, with the advance approval and participation of H.J. Heinz in Pittsburgh. Dayhoff claims that Heinz Italia directly participated in all aspects of this transaction, which participation it claims to be sufficient to confer specific jurisdiction over Heinz Italia under Pennsylvania's long-arm statute.

In deciding a motion to dismiss for lack of personal jurisdiction, we take the allegations of the complaint as true. *Narco Avionics, Inc. v. Sportsman's Mkt., Inc.*, 792 F. Supp. 398, 402 (E.D. Pa. 1992). But once a defendant has

raised a jurisdictional defense, a plaintiff bears the burden of proving by affidavits or other competent evidence that jurisdiction is proper. *Id.* (citing *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir.), *cert. denied*, 498 U.S. 847, 111 S.Ct. 133 (1990)); *see also Mellon Bank (East) v. DiVeronica Bros.*, 983 F.2d 551, 554 (3d Cir. 1993).

Under Fed. R. Civ. P. 4(e), we will apply Pennsylvania law to the jurisdictional issue. Pennsylvania's long-arm statute authorizes the exercise of personal jurisdiction over nonresidents "to the fullest extent allowed under the Constitution of the United States . . . based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b) (1981). Section 5322(a) sets forth a variety of examples of sufficient contact, such as "[t]ransacting any business in this Commonwealth." *Id.* § 5322(a)(1) (Purdon's Supp. 1995). Section 5322(b) further expands the potential bases for jurisdiction. When personal jurisdiction is based solely on minimum contacts under the long-arm statute, it is limited to "a cause of action or other matter arising from acts" which confer jurisdiction. *Id.* § 5322(c). As the district court noted, "[s]pecific jurisdiction arises when the plaintiff's claim is related to or arises out of the defendant's contacts with the forum." *Dayhoff, Inc. v. H.J. Heinz Co.*, No. 93-1794, slip op. at 13 (W.D. Pa. Oct. 3, 1994) (quoting *Mellon Bank (East) PSFS, N.A. v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992)). A plaintiff must demonstrate that a defendant

purposefully has established "sufficient minimum contacts with the forum state that it 'should reasonably anticipate being haled into court there.' " *DiVeronica Bros.*, 983 F.2d at 554.

Dayhoff argues that Heinz Italia has had a wide range of contacts in Pennsylvania that would support the district court's exercise of jurisdiction over it. The district court found, however, that even assuming that all of Dayhoff's allegations are true, none of the contacts gave rise to or related, in any way, to this litigation. *Dayhoff, Inc. v. H.J. Heinz Co.*, No. 93-1794, slip op. at 14 (W.D. Pa. Oct. 3, 1994). The court concluded that the contacts between Heinz Italia and Hershey regarding the sale of the confectionery business could not properly be considered in a determination of whether there was personal jurisdiction, because "the sale of the Heinz Italia confectionery business is not the subject of this litigation." *Id.* Moreover, the court found that Dayhoff had "provided no evidence which would indicate that any activities relating to the formation or breach of this agreement or the actions on the part of Dayhoff or Heinz Italia (who is not even a party to the Agreements) were directed toward this forum." *Id.* at 14-15.

We disagree with the conclusion of the district court. We conclude, instead, that the court took too narrow a view of the "subject of this litigation." In our view, this litigation is concerned intimately with Heinz Italia's sale of its confectionery business to Hershey in that Dayhoff alleges, apparently with good reason, that the sale itself precipitated the termination of its agreements. Furthermore, the agreements were performed in the United States, and Heinz Italia was the party who sent the letter

of September 28, 1993, terminating them. Moreover, Dayhoff accuses Heinz Italia, *inter alia*, of tortious interference with contract, alleging that Heinz Italia interfered with its contracts with Heinz Dolciaria in order to sell that business to Hershey.[15] It seems to us that these very claims against Heinz Italia are the "subject of this litigation," not merely the contracts between Dayhoff and Heinz Dolciaria. We see no need to discuss this point further because we think it clear that according to our view of the "subject of this litigation," Dayhoff has demonstrated that Heinz Italia has many contacts with Pennsylvania. Accordingly, we will reverse the order of the district court dismissing all claims against Heinz Italia for lack of personal jurisdiction.

IV. CONCLUSION

For the foregoing reasons, we will affirm the court's orders of October 3, 1994, and July 10, 1995, to the extent that those orders reflect the district court's conclusions that Dayhoff is bound by the arbitration and forum selection clauses of the 1989 and 1990 agreements with respect to its claims against Heinz Dolciaria and its successor, Sperlari s.r.l. We also will affirm the summary judgment against Dayhoff on its claims based upon the 1992 agreement, except on its claim of fraud with respect to the alleged assurance to it that the sale to Hershey would not affect its contracts with Heinz Dolciaria. However, we

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[15] This issue is foreclosed by our opinion only as to the 1992 agreement. We do not now consider whether the relationship among the three Heinz corporations precludes a tortious interference claim against H.J. Heinz or Heinz Italia.

limit recovery for that fraud, if it is established, to damages. Otherwise, we will reverse the orders of October 3, 1994, and July 10, 1995, and will remand the case to the district court for further proceedings consistent with this opinion. In particular, the case may proceed against the appellees other than Heinz Dolciaria and Sperlari s.r.l. in the district court without regard for the arbitration and forum selection clauses of the 1989 and 1990 agreements, and the district court will exercise jurisdiction over Heinz Italia. The action may proceed for fraud claims related to the termination of the 1992 agreement to the limited extent we have described. The parties will bear their own costs on this appeal.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Filed July 24, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3404 and 96-3250

DAYHOFF INC.,
a California corporation;

Appellant

v.

H.J. HEINZ CO., a Pennsylvania corporation; HEINZ ITALIA S.p.A., an Italian corporation; HEINZ DOLCIARIA S.p.A., formerly known as SPERLARI S.p.A., an Italian corporation; SPERLARI s.r.l., an Italian corporation; and HERSHEY FOODS CORPORATION, a Delaware corporation.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 93-cv-01794)

BEFORE: GREENBERG, ALITO, and MCKEE,
Circuit Judges

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL
ORDER AMENDING SLIP OPINION

The petition for rehearing filed by the appellees, H.J. Heinz Co., Heinz Italia S.p.A., Heinz Dolciaria S.p.A., Sperlari, s.r.l. and Hershey Foods Corporation, in the above captioned matter having been submitted to the judges who participated in the decision of this court and the panel having determined to grant the petition but only to the extent of amending the panel opinion.

It is hereby ordered that the slip opinion in the above case filed June 24, 1996, be amended to the end that the incomplete paragraph at the bottom of the page shall end eight lines from the bottom at the end of the sentence concluding "may be distinguished from that before us." At that point two paragraphs reading as follows shall be inserted:

> Further, this case presents a different issue than those we addressed in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993), and *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993). In *Barrowclough*, we upheld the enforcement of an arbitration clause in an action between a fired employee and his former employer, applying the agreement not only to the plaintiff's claims against his employer, but also to his claims against additional, non-signatory defendants. However, in *Barrowclough*, the plaintiff had signed an agreement with the **New York** and American Stock Exchanges that required him to submit all disputes "arising out of [his] employment or the termination of [his] employment" to arbitration. *Id.* at 937. The non-signatory defendants, who were directly tied to

the plaintiff's former employer, did not object to arbitration. *Id.* at 938. Moreover, the contingent beneficiaries under the plaintiff's deferred compensation plan, who joined in the suit as plaintiffs, claimed no present entitlement to the deferred compensation and pressed no claims separate from his. *Id.* Thus, we held that their "inchoate and derivative claims should not entitle them to maintain separate litigation in a forum that has been waived by the principal beneficiary." *Id.* at 938-39. *Barrowclough* thus presented a vastly different factual scenario from the case before us.

Likewise, our holding in *Pritzker* does not alter our decision here. In that case, we reaffirmed the idea that "[b]ecause a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." 7 F.3d at 1121. We also held there that an arbitration agreement between pension plan trustees and a securities broker applied to the broker's sister corporation that acted as the broker's advisor and that allegedly participated knowingly in breaches of fiduciary duties owed to the plan. Even though the sister corporation had not signed the arbitration agreements, we applied agency logic in finding that the sister corporation's interests were directly related to, if not predicated upon, the broker's conduct and that the trustee's claims against it were therefore subject to compulsory arbitration. Clearly, this agency theory is not applicable to the facts before us.

Following the insertion of the foregoing two paragraphs the incomplete paragraph shall resume with the

words "We also point out" but these words shall be the beginning of a new complete paragraph.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: July 24, 1996

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3404 and 96-3250

DAYHOFF INC.,
a California corporation;

Appellant

v.

H.J. HEINZ CO., a Pennsylvania corporation;
HEINZ ITALIA S.p.A., an Italian corporation;
HEINZ DOLCIARIA S.p.A., formerly known as
SPERLARI S.p.A., an Italian corporation;
SPERLARI s.r.l., an Italian corporation;
and HERSHEY FOODS CORPORATION,
a Delaware corporation.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 93-cv-01794)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*,
and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, *Circuit Judges*

The petition for rehearing filed by the appellees, H.J. Heinz Co., Heinz Italia S.p.A., Heinz Dolciaria S.p.A., Sperlari, s.r.l. and Hershey Foods Corporation, in the

above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing before the court in banc, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing before the court in banc is denied. A separate order is being entered on the petition for panel rehearing.

BY THE COURT:

/s/ Illegible
Circuit Judge

DATED: JUL 24, 1996

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAYHOFF, INC., a California, corporation,	)	
Plaintiff,	)	
-vs-	)	Civil Action No. 93-1794
H.J. HEINZ CO., a Pennsylvania corporation, HEINZ ITALIA, s.p.a. an Italian corporation, HEINZ DOLCIARIA, s.p.a. aka s.r.l., and formerly known as SPERLARI s.p.a., an Italian corporation, and HERSHEY FOODS CORPORATION, a Delaware corporation,	)	
Defendants.	)	

AMBROSE, District Judge.

OPINION

and

ORDER OF COURT

This diversity action was initiated by Plaintiff, Dayhoff, Inc. a California corporation [hereinafter Dayhoff], on October 29, 1993, and involves the cancellation of three agreements entered into for the licensing and distribution of candy. In its Complaint, Dayhoff alleges claims

for breach of contract, fraud, conspiracy, tortious interference with contractual relations, and seeks, *inter alia*, a declaratory judgment, restitution, reformation, injunctive relief, and a constructive trust, in addition to compensatory and punitive damages against Defendants H.J. Heinz Co. [Heinz], Heinz Italia, Heinz Dolciaria, Sperlari s.r.l., and Hershey Foods Corporation [Hershey]. Dayhoff Australia Pty. Ltd., an Australian corporation, [Dayhoff Australia] was originally named as a plaintiff in this suit; however, because the presence of Dayhoff Australia destroyed the parties' diversity of citizenship, Dayhoff Australia transferred and assigned to Dayhoff, with the knowledge and consent of Heinz Dolciaria and Heinz Italia, its rights under the 1989 Agreement and was dropped as a party plaintiff. (Amended Complaint ¶ 16)

A consolidated motion has been filed by Defendants for dismissal of the Complaint for lack of personal jurisdiction over Heinz Dolciaria and Heinz Italia, for summary judgment with regard to the 1992 Agreement, and for dismissal of all claims relating to the 1989 and 1990 Agreements based on forum selection clauses contained in the Agreements which provide that any disputes relating to the Agreements would be litigated in Italy. The parties were given the opportunity to conduct limited discovery and have submitted several briefs and voluminous deposition testimony, affidavits and exhibits in support of their respective positions. For the reasons set forth below, Defendants' motion will be granted in part and denied in part.[1]

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[1] With respect to Plaintiff's request for oral argument, in light of the fact that the parties have submitted in excess of 180

The first agreement at issue (the 1989 Frutteto Licensing Agreement) was entered into in October, 1989, between Sperlari S.p.A. and Dayhoff Australia. This Agreement provided Dayhoff Australia with an exclusive ten-year license to manufacture and sell Frutteto candies in Australia and India and was apparently later made applicable to the United States. (Amended Complaint ¶ 13-14; see also Defendants' Addendum to Brief in Support of Motions, Exhibit A) Sperlari S.p.A. later assigned its rights under this Agreement to Heinz Dolciaria. (Defendants' Addendum to Brief in Support of Motions, Exhibit C, ¶ 2) The second agreement (the 1990 Frutteto Distribution Agreement) was entered into between Dayhoff and Sperlari S.p.A in July, 1990, pursuant to which Sperlari S.p.A appointed Dayhoff as its sole United States distributor for Frutteto candies. (Amended Complaint, ¶ 17; see also Defendants' Addendum to Brief in Support of Motions, Exhibit B) Sperlari S.p.A. later assigned its rights under this Agreement to Heinz Dolciaria. (Defendants' Addendum to Brief in Support of Motions, Exhibit C, ¶ 3) The third agreement was entered into between Dayhoff and Heinz Dolciaria (the Bulk Candy Distribution Agreement) in July, 1992. With this agreement, Heinz Dolciaria appointed Dayhoff as the exclusive United States distributor for certain candies manufactured by Heinz Dolciaria for an eight-year term. (Amended Complaint, ¶ 18)

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pages of legal argument, in addition to the volumes of exhibits, deposition testimony, and affidavits, we believe that the parties have had more the [sic] ample opportunity to set forth their positions and that oral argument is not necessary.

In September, 1993, Heinz Italia (the parent company of Heinz Dolciaria) sold its entire confection business to Defendant Hershey.[2] (Amended Complaint, ¶ 30) Thereafter, the three Agreements between Dayhoff and Heinz Dolciaria (which is presently known as DOL., s.p.a.) were terminated. The instant action followed.

We will first address Defendants' contention that we should dismiss all claims relating to the 1989 and 1990 Frutteto Agreements based on the forum selection clauses contained in the Agreements. The 1989 Frutteto Licensing Agreement provides that:

> 21. LEGISLATION APPLICABLE
>
> This Contract is regulated and disciplined by Italian Law.
>
> 22. ARBITRATION
>
> All controversies arising from the present contract or relating to the same will be definitively settled according to the Reconciliation and Arbitration Rules of the International Chamber of Commerce, excluding recourse to the common law courts, by one or more arbitrators appointed in accordance with these Rules.
>
> The arbitration tribunal will decide on its competence to decide the matter and on the validity of the arbitration clause.

---

[2] Defendant Sperlari s.r.l. was apparently formed in order to facilitate Hershey's purchase of the confectionery business of Heinz Italia. We would note, however, that Sperlari S.p.A. (the original party to the 1989 and 1990 Frutteto Agreements) is not the same company as Defendant Sperlari s.r.l. (See Defendants' Addendum to Brief in Support of Motions, Exhibit E, ¶ 5)

> Each party can apply to the relevant Law Courts to confirm the arbitration sentence or enforce execution of the same.
>
> Arbitration proceedings will take place in Milan.

See Defendants' Addendum to Brief in Support of Motion to Dismiss and/or for Summary Judgment, Exhibit A.

The 1990 Frutteto Distribution Agreement provides:

> 8. GOVERNING LAW
>
> This Agreement shall be governed and constructed in accordance with the laws of Italy and the parties hereto irrevocably submit to the exclusive jurisdiction of the Court of Cremona (Italy).

See Defendants' Addendum to Brief in Support of Motion to Dismiss and/or for Summary Judgment, Exhibit B.

Both of these Agreements were executed by the parties in Cremona, Italy. Defendants argue that this Court should dismiss all claims brought by Plaintiff under the 1989 and 1990 Agreements due to the existence of the forum selection clauses regardless of whether the claims sound in tort or contract. Defendants further argue that Heinz, Heinz Italia, Sperlari s.r.l., and Hershey have standing to assert the forum selection clauses even though they admittedly are not parties to the Agreements because Plaintiff's tort claims require interpretation of the Agreements. Plaintiff argues that this forum is the only one which will provide it with complete relief and that the enforcement of the forum selection clauses would deprive it of its day in court. Plaintiffs further argue that the Italian forum is inadequate and that Heinz, Hershey,

Sperlari s.r.l., and Heinz Italia are strangers to the clauses and therefore cannot invoke their protection.

We begin our analysis of the enforceability of the forum selection clause by noting that a forum selection clause is presumptively valid. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). This presumptive validity can be overcome if the party resisting the enforcement of the forum selection clause can show it is unreasonable under the circumstances. *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993). A party can demonstrate unreasonableness by showing that:

> 1) the incorporation of the forum selection clause into the contract was the result of fraud, undue influence or overweening bargaining power; 2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or 3) the enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought as declared by statute or judicial decision.

Bonny, 3 F.3d at 160.

Plaintiff argues, *inter alia*, that the enforcement of the forum selection clause is unreasonable because Italian courts would have no authority to enforce preliminary or permanent injunctive relief in the United States, that even if the forum selection clauses were bargained for that Dayhoff had no reason to foresee that Hershey would attempt to invoke the clauses, and that only in this Court

can Dayhoff receive complete, consistent and meaningful relief.[3]

After carefully reviewing Plaintiff's submissions, we find that it is not unreasonable to enforce the forum selection clauses. The parties to the Agreements were sophisticated business people and there is no indication that Plaintiff was not aware, or could not have made itself aware, of the consequences that would result from including the forum selection clauses in the Agreements including whether the chosen forum was adequate and convenient. Simply because Plaintiff is unhappy, in retrospect, about the forum it designated is insufficient to warrant a finding that the clauses are unenforceable. It would be patently unfair to allow Plaintiff to avoid the mandates of the forum selection clauses due to inconvenience because we would merely be shifting the burden of inconvenience to the other party to the Agreement, an Italian corporation. We also believe that factors which weigh heavily in favor of enforcing the forum selection clauses include the fact that the parties agreed that Italian law would govern the Agreements and that the Agreements are international in character and have, at most, a tenuous relationship to the Western District of Pennsylvania.

Plaintiff also argues that the claims against Hershey were not foreseeable at the time the Agreements were entered into. We recognize that this is an appropriate

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[3] Plaintiff also asserts various other arguments which are entirely inappropriate in considering whether the forum selection clause is enforceable and therefore need not be addressed.

consideration under *Bremen;* however, we find that this factor does not, in and of itself, mandate a finding that enforcement of the forum selection clauses is unreasonable. Hershey is not the only party to the suit and since Plaintiff should properly litigate its claims against Heinz Dolciaria in Italy it is not unreasonable for it to assert its claims against Hershey with respect to these Agreements in Italy, too. Plaintiff also argues that since Heinz Dolciaria agreed to litigate in this forum under the 1992 Bulk Distribution Agreement, the last manifestation of the parties should control. We believe, however, that if the parties wished to modify the 1989 and 1990 forum selection clauses when they entered into the 1992 Bulk Candy Distribution Agreement, then they clearly could have done so. While this Court recognizes the potential inconvenience of litigating the claims under the 1992 Bulk Candy Distribution Agreement in one forum and litigating the 1989 and 1990 Agreements in another forum, Plaintiff bargained for the different forum selection clauses and we see no reason to second guess the parties' business judgment.

With respect to Plaintiff's allegations concerning the inadequacy of the Italian forum, we find that Plaintiff has not established that the "contractual forum will be so gravely difficult and inconvenient that [it] will for all practical purposes be deprived of [its] day in court." *M/S Breman,* 407 U.S. at 1917. Plaintiff has failed to come forward with sufficient evidence to establish that enforcement of the clause is unreasonable.

We next address Plaintiff's contention that the tort claims it has asserted against Hershey, Heinz Italia, Sperlari s.r.l., and Heinz are not governed by the forum selection clauses because those Defendants are strangers to the Agreements. "Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Manetti-Farrow Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). Plaintiff asserts claims of fraud, conspiracy, and tortious interference with contractual relations. All of these claims relate to the rights and duties of the parties under Agreements. Although Heinz, Heinz Italia, Sperlari s.r.l. and Hershey are not parties to the Agreements, their conduct is so closely related to the contractual relationship between Heinz Dolciaria and Dayhoff that we find that the forum selection clause applies to all Defendants. *Manetti-Farrow*, 858 F.2d at 514.

In sum, we find that Plaintiff has failed to demonstrate unreasonableness and that the resolution of all of the tort claims against Hershey, Heinz, Sperlari s.r.l. and Heinz Italia relate to the interpretation of the contract. All claims which relate to the 1989 and 1990 Frutteto Agreements will therefore be dismissed. This dismissal is qualified, however, on the condition that Hershey and Heinz agree to voluntarily appear in Italy and subject themselves to the jurisdiction of the Italian courts for the purpose of litigating the claims that may be asserted by Plaintiff relating to the 1989 and 1990 Frutteto Agreements. *Bonny*, 3 F.3d at 163.

We next address Defendants' contention that summary judgment is appropriate with regard to the Bulk Candy Distribution Agreement because the Agreement

contains a provision which provides that in the event of the sale of substantially all of the assets of either party or a change in control of either party, the agreement may be terminated. Plaintiff argues that it interpreted the termination provision differently and therefore summary judgment with respect to this claim is not appropriate.

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing

that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 322.

The termination provision provides that:

> 14.3 Either party shall have the right to terminate this Agreement upon written notice to the other party in the event that the other party becomes bankrupt, insolvent, or goes into liquidation, or in the event that either party assigns the whole or any substantial part of its business or assets or merges with another company or undergoes a change of control.

1992 Bulk Candy Distribution Agreement, Defendants' Addendum to Brief, Exhibit D.

Plaintiff argues that it believed that this provision meant that if one party assigned the whole or any substantial part of its business or assets or merges with another company or undergoes a change of control, only the other party could terminate the Agreement. While the termination provision appears clear in meaning, in light of the fraud count in the Complaint, we must find that there are genuine issues of material fact which preclude granting summary judgment based on the existence of the termination provision in the 1992 Bulk Distribution Agreement. However, because of the apparent clarity of the termination provision and the importance of this provision in this litigation, we will enter a discovery schedule providing for a brief period of discovery limited to Plaintiff's Twelfth Claim for Relief (Fraud) and the remaining claims of Plaintiff will be held in abeyance

pending resolution of the issues raised in the Twelfth Claim for Relief in Plaintiff's Amended Complaint.

We finally address Defendants' argument that this Court does not have personal jurisdiction over Heinz Italia and that this Court only has personal jurisdiction over Heinz Dolciaria to the extent that it consented to jurisdiction in the 1992 Bulk Candy Distribution Agreement. Based on our disposition of the forum selection clause issue, we need not decide whether of [sic] not this Court can properly exercise jurisdiction over Heinz Dolciaria under the 1989 and 1990 Agreements.

In deciding a motion to dismiss for lack of personal jurisdiction, the allegations of the complaint are taken as true. *Narco Avionics, Inc. v. Sportsman's Mkt., Inc.*, 792 F.Supp. 398, 402 (E.D. Pa. 1992). Once a defendant has raised a jurisdictional defense, however, the plaintiff bears the burden of proving by affidavits or other competent evidence, that jurisdiction is proper. *Id., see also, Mellon Bank (East) v. DiVeronica Bros.*, 983 F.2d 551, 554 (3d Cir. 1993), *Rockwell Int'l v. Costruzioni Aeronautiche Giovanni Augusa*, 553 F.Supp. 328, 330 (E.D. Pa. 1982).

In order to determine whether we can maintain jurisdiction over a nonresident defendant, "we must first determine whether the exercise of jurisdiction is authorized under the state (or appropriate federal) long-arm statute and then whether it meets the requirements of the Due Process Clause of the United States Constitution." *Renner v. Lanard Toys Ltd.*, No. 94-3009, slip op. at 4 (3d Cir. August 25, 1994). Fed. R. Civ. P. 4 (e) allows this Court to exercise personal jurisdiction over non-resident defendants to the extent permissible under the state law

of the jurisdiction where the court sits. *Grand Entertainment Group v. Star Media Sales*, 988 F.2d 476 (3d Cir. 1993). Pennsylvania's long-arm statute, in addition to setting forth various specific acts which may allow a court to exercise personal jurisdiction over a non-resident provides that:

> In addition to the provision of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

42 Pa.Cons.Stat.Ann. § 5322 (b) (1981).

The exercise of jurisdiction, in the absence of a scenario which would satisfy one of the particular requirements of 42 Pa.Cons.Stat.Ann. § 5322 (a), is based on a determination of whether the exercise of personal jurisdiction over the defendant would be constitutional. *Id.*

We would first note that with regard to general personal jurisdiction, it is clear that Heinz Italia is not qualified as a foreign corporation in Pennsylvania and does not conduct systematic or continuous business activity in this forum. 42 Pa.Cons.Stat.Ann. § 5301 (a)(2), *Grand Entertainment*, 988 F.2d at 481 n.3. We therefore find that no general personal jurisdiction over Heinz Italia exists.

Accordingly, Plaintiff must demonstrate that this Court has specific personal jurisdiction over Heinz Italia. "Specific jurisdiction arises when the plaintiff's claim is related to or arises out of the defendant's contacts with

the forum." *Mellon Bank (East) v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992). Thus, Plaintiff must demonstrate that Defendant has purposefully established "sufficient minimum contacts with the forum state that it should reasonably anticipate being hauled into court there." *DiVeronica Bros.*, 983 F.2d at 554.

Plaintiff argues that Heinz Italia has a wide range of contacts in Pennsylvania which would support this Court's exercise of jurisdiction over it. We find, however, that even assuming that all of Plaintiff's allegations are true, none of the contacts that Heinz Italia may have had with this forum gave rise to or relate, in any way, to this litigation. For example, many of Plaintiff's arguments concern contacts between Heinz Italia and Hershey regarding the sale of the confectionery business of Heinz Italia. These contacts cannot properly be considered to determine personal jurisdiction because the sale of the Heinz Italia confectionery business is not the subject of this litigation. Plaintiff also argues that there have been direct and indirect shipments of merchandise to Pennsylvania under the two Frutteto and the Bulk Candy Distribution Agreements. While Plaintiff asserts that this is a proper basis for exercising jurisdiction under 42 Pa.Cons.Stat.Ann. § 5322 (iii), the statute provides that the specific act of shipping merchandise directly or indirectly into or through the Commonwealth will give rise to specific jurisdiction only if the cause of action or other matter *arises from* the specific act. *See* 42 Pa.Cons.Stat.Ann. § 5322 (a) (West.Supp. 1994). The allegations in this civil action do not arise from the distribution of candy in Pennsylvania; rather, they arise from the alleged breach of three agreements between a California

corporation and an Italian corporation. Plaintiff has provided no evidence which would indicate that any activities relating to the formation or breach of this agreement or the actions on the part of Dayhoff or Heinz Italia (who is not even a party to the Agreements) were directed toward this forum.

That some of the products named in the Agreements would be distributed in Pennsylvania may be a persuasive argument under the stream of commerce theory, *see Asahi Metal Ind. v. Superior Ct. of Cal. Solano Cty.*, 480 U.S. 103 (1987), *Renner*, No. 94-3009 slip op (3d Cir. August 25, 1994); however, this action does not arise out of the distribution of products in this forum. Hence, we cannot find that it comports with due process to find that an Italian corporation whose subsidiary entered into a contract in Italy with an Australian or a California corporation could "reasonably anticipate being hauled into court" in Pennsylvania as result of an alleged breach of the contract, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), or that or [sic] Heinz Italia purposefully directed any activity regarding the Agreements to this forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 464 (1985).

Plaintiff finally argues that the jurisdictional contacts of Heinz and Hershey should be attributed to Heinz Italia and advances alter ego and piercing the corporate veil theories in support of its argument. After carefully reviewing Plaintiff's arguments, we find that they are without merit.

* * *

DATE FILED:	OCTOBER 3, 1994
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAYHOFF, INC., a California, corporation,	)	
Plaintiff,	)	
-vs-	)	Civil Action No. 93-1794
H.J. HEINZ CO., a Pennsylvania corporation, HEINZ ITALIA, s.p.a. an Italian corporation, HEINZ DOLCIARIA, s.p.a. aka s.r.l., and formerly known as SPERLARI s.p.a., an Italian corporation, and HERSHEY FOODS CORPORATION, a Delaware corporation,	)	
Defendants.		

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this **3rd** day of October, 1994, after careful consideration and for the reasons set forth in the Opinion accompanying this Order, the following order is **ENTERED**:

1. Defendants' Motion for Dismissal of All Claims Relating to the 1989 & 1990 Agreements, based on forum selection clauses contained in the Agreements (Docket #: 62) is **GRANTED**, conditioned upon the submission of H.J. Heinz and Hershey to the jurisdiction of the Italian Courts.

2. Defendants' Motion for Summary Judgment with regard to the 1992 Agreement (Docket #: 62) is **DENIED** at this time. The parties are given sixty (60) days from the date of this Order to conduct additional discovery limited to Plaintiff's Twelfth claim for Relief (Fraud). After said limited discovery closes, the parties shall submit briefs (***not exceeding ten (10) pages***) and other pertinent submissions in support of their respective positions. The Court will then rule on all issues set forth in Defendants' Motion for Summary Judgment.

3. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction over Heinz Dolciaria is moot in light of the Order with regard to the Motion to Dismiss based on forum selection clauses and Heinz Dolciaria's agreement to litigate in this forum under the 1992 Agreement. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction over Heinz Italia is **GRANTED**.

4. A Status Conference is scheduled for Friday, October 14, 1994 at 11:00 A.M.

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U. S. District Judge

PC DALE HERSHEY, ESQ.
DANIEL I. BOOKER, ESQ.
BUREAU OF NATIONAL AFFAIRS
FILE

No. 96-536

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

H.J. HEINZ CO., HEINZ ITALIA, S.p.A., HEINZ DOLCIARIA S.p.A. (formerly known as SPERLARI S.p.A.), SPERLARI s.r.l., and HERSHEY FOODS CORPORATION,

Petitioners,

vs.

DAYHOFF, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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22 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Should claims for tortious interference with contract and related claims, brought by a contracting party against defendants which are not parties to the contract, and with which the plaintiff has made no agreement respecting arbitration or forum selection, be dismissed on the basis of an arbitration clause or forum selection clause in the contract?

STATEMENT OF INTERESTED PARTIES

The parties are stated correctly in the caption to the petition for a writ of certiorari.

Pursuant to S. Ct. Rule 29.6, respondent Dayhoff, Inc., states that its former parent corporation, now a shareholder, is Dayhoff Australia Pty, Ltd. Respondent does not have a nonwholly owned subsidiary corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit. The opinion of the Court of Appeals, as amended on rehearing, is reported at 86 F.3d 1287 (3d Cir. 1996), and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-39a, 40a-43a.

COUNTERSTATEMENT OF THE CASE

Petitioners H.J. Heinz Co. ("Heinz"), Heinz Italia, S.p.A. ("Heinz Italia"), Heinz Dolciaria S.p.A. ("Heinz Dolciaria"), Sperlari s.r.l. ("Sperlari"), and Hershey Foods Corporation ("Hershey") seek review of a Third Circuit decision which reversed the dismissal of certain claims brought by respondent Dayhoff, Inc. ("Dayhoff") and remanded for further proceedings in the District Court. The facts are set forth at length in the opinion of the Third Circuit. *See Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1289-93 (3d Cir. 1996) (Pet. App. 3a-14a).

This litigation involves, and the opinion of the Third Circuit discusses, three candy manufacturing or distribution contracts between Dayhoff and Heinz Dolciaria, or between Dayhoff and the predecessor to Heinz Dolciaria, Sperlari S.p.A.[1] As petitioners state, only two contracts are at issue before this Court: the October 19, 1989 License Agreement (the "License Agreement"), and the July 26, 1990 Frutteto Distribution Agreement (the "Distribution Agreement").[2]

---

1. Sperlari S.p.A., the predecessor to Heinz Dolciaria, is distinct from petitioner Sperlari.

2. Dayhoff notes that in describing the genesis of the License Agreement, petitioners state that the agreement, "according to Dayhoff," was assigned to Dayhoff by another company, Dayhoff Australia Pty, Ltd. *See* Petition for a Writ (Cont'd)

The License Agreement contains an arbitration clause, providing for international arbitration in Italy, that governs claims between the contracting parties arising under the contract. *See* 86 F.3d at 1289 (Pet. App. 4a). The Distribution Agreement contains a forum selection clause by which the contracting parties submit to the exclusive jurisdiction of the Court of Cremona, Italy. *See id.* at 1290 (Pet. App. 5a). The Petition discusses both provisions at length. *See, e.g.*, Pet. at 2-4, 7-9, 10-11. Petitioners' statement of the "Question Presented," however, omits reference to the arbitration clause as such and mentions only "a forum selection clause" requiring "adjudication" in Italy. Pet. at i. Because the clause in the License Agreement is an arbitration clause which does not require "adjudication" of any kind, petitioners appear to have framed a question that seeks certiorari only with respect to the holding of the Court of Appeals regarding the Distribution Agreement, which does contain a provision regulating adjudication. Nevertheless, because the remainder of the Petition addresses both contracts, and both clauses, Dayhoff will do so as well.

Pursuant to S. Ct. Rule 15.2, Dayhoff hereby calls to the attention of the Court what Dayhoff believes to be a misstatement contained in the Petition. In the "Question Presented," petitioners state unequivocally that the tortious interference claims brought by Dayhoff "*require for their resolution* a determination of whether one signatory has breached the agreement." Pet. at i (emphasis added). Similarly, petitioners argue that "resolution" of Dayhoff's tortious

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(Cont'd)
of Certiorari ("Pet.") at 2. Petitioners' description may suggest that the assignment itself is a matter of dispute; it is not. Neither the assignment nor Dayhoff's right to assert claims under or relating to the License Agreement was controverted before the Third Circuit, *see* 86 F.3d at 1289, 1293 (Pet. App. 3a-4a, 13a), and neither matter is before this Court.

interference claims against certain of petitioners "will turn on the issue of whether Dayhoff's termination constituted a breach of the 1989 License Agreement and the 1990 Frutteto Distribution Agreement – the same issue that the parties to those contracts agreed to have adjudicated in Italy under Italian law." Pet. at 16. Petitioners cite to no authority in support of this proposition.

Petitioners simply *assume* that Dayhoff must prove an actual breach of contract as an element of its claims for tortious interference with contract. There has been no holding from the District Court to this effect, however, and Dayhoff does not concede the point. Dayhoff believes that wrongful action inducing termination of a contract may, in appropriate circumstances, constitute tortious interference with contract even if the contract itself is not breached.[3] Indeed, many jurisdictions recognize a parallel tort of interference with prospective contractual relations, which obviously cannot require a breach of contract because no binding contract exists at the time the tort is committed.

Moreover, the District Court has not yet determined which jurisdiction's law must be applied to Dayhoff's tortious interference claims. Obvious candidates are Pennsylvania and California, among American jurisdictions, and Italy. This and other choice of law questions are expected to be addressed by the District Court as the case draws nearer to trial. Given that the required elements of torts are formulated somewhat differently from state to state, and may be markedly different when the law of foreign countries is considered, without a determination of the governing law any discussion of allegedly mandatory

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3. *See, e.g., Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 618 n.6 (Pa. Super. 1980) ("Of course, an action for intentional interference with the performance of a contract lies even though the contract interfered with is terminable at the will of the parties.").

elements of the tortious interference claims is premature, and likely misleading. In any event, the issues of choice of law and the elements of the tort claims are not the subject of the Petition, nor are petitioners' views on these unresolved issues the appropriate context for considering whether to grant certiorari on the arbitration and forum selection issues.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE TEACHING OF THIS COURT'S DECISION IN *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*.

In declining to permit nonsignatories to enforce contractual arbitration and forum selection clauses against Dayhoff, the Third Circuit simply applied elementary contract law, as explicated most recently by this Court in its unanimous opinion in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995). Contrary to the pinched reading offered by petitioners, *Kaplan* plainly stands for the proposition that arbitration clauses (and, by extension, forum selection clauses), like all contracts, must be enforced according to their terms. A party can be required to arbitrate only that which it has agreed to arbitrate, and only with an adversary with which it has agreed to arbitrate.

The precise issues before this Court in *Kaplan*, of course, focused on the standard of review to be applied to decisions regarding arbitrability of disputes. *See* 115 S. Ct. at 1923, 1926. Nevertheless, the decision of the Court on these issues rested firmly on the fundamental principle that "arbitration is simply a matter of contract between the parties; it is a way to resolve

those disputes — *but only those disputes* — that the parties have agreed to submit to arbitration." *Id.* at 1924 (emphasis added). This principle was essential to this Court's decision; indeed, the Court stated that the result "flow[ed] inexorably" from the principle. *Id.* Far from being "general dicta," as petitioners insist, Pet. at 14, the Court's statement of this principle is the crucial starting point for the entire analysis.

This Court observed that "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligations under a contract)." 115 S. Ct. at 1923. This statement of black letter law is directly applicable to Dayhoff's case, and it demonstrates the propriety of the holding of the Third Circuit. Dayhoff has a constitutional and statutory right to litigate its claims in federal court unless it has made an agreement to the contrary with the defendants. The Third Circuit did not hold that the arbitration and forum selection clauses in Dayhoff's contracts were void or disfavored; rather, the Court of Appeals simply held that Dayhoff had not agreed to an arbitration or forum selection clause with defendants such as Heinz and Hershey. *See* 86 F.3d at 1296-97 (Pet. App. 22a-23a). This holding is consistent with — indeed, compelled by — the teaching of this Court in *Kaplan* that "the basic objective in this area is not to resolve disputes in the quickest manner possible, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.' " 115 S. Ct. at 1925 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995)) (additional internal quotation marks omitted). The Third Circuit correctly enforced Dayhoff's contracts according to their terms, not according to the wishes of petitioners.

Petitioners' exceedingly narrow reading of this Court's decision in *Kaplan* demonstrates petitioners' recognition that

the teaching of *Kaplan* requires the result that the Third Circuit reached below. Because the Court of Appeals followed this teaching admirably, petitioners have attempted to argue that *Kaplan* does not really mean what it says — that its declaration of the bedrock principle for interpreting and applying arbitration agreements is mere background noise, to be disregarded in favor of the sweeping, result-oriented interpretations favored by petitioners. This contention must be rejected. The holdings of *Kaplan* on the narrow standard of review questions are intelligible only in light of *Kaplan*'s clear statement of the general rule governing all arbitration agreements. *Kaplan* mandates the result reached by the Third Circuit in this case.

Petitioners also suggest that *Kaplan* may be distinguished on the basis that the petitioners there "did not agree to arbitration of *any* disputes involving their agreement with First Options," whereas Dayhoff agreed to arbitrate with Heinz Dolciaria. Pet. at 13-14 (emphasis in original). As the decision of the Third Circuit in *Kaplan* makes clear, however, this distinction is tenuous at best as a factual matter, because Mr. Kaplan did sign an arbitration agreement, in a representative capacity, on behalf of a corporation alleged to be his "alter ego." *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1506-07, 1520-23 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995). Moreover, as a matter of law the distinction is irrelevant, because the simple principle articulated by this Court transcends trivial alignments of parties in individual cases. The Kaplans were not compelled by the courts to arbitrate with First Options because they had not agreed to arbitrate with First Options. Dayhoff has not been compelled to arbitrate with Heinz, Hershey, and the other nonsignatory petitioners because Dayhoff did not agree to arbitrate anything with them. The analogy is precise. The fact that Dayhoff did agree to arbitrate with Heinz Dolciaria is beside the point; the claims against Heinz Dolciaria have been relegated to Italy. *See* 86 F.3d at 1298 (Pet. App. 26a-27a).

Petitioners cavalierly brush aside the fact that, before the District Court, the nonsignatory defendants were in effect offered arbitration and adjudication in Italy as an *option*, that is, the District Court agreed to dismiss Dayhoff's claims against the nonsignatory defendants if they would agree to submit to the various Italian proceedings. *See* 86 F.3d at 1297 (Pet. App. 23a). As the Third Circuit put it: "The very fact that Hershey would have such a choice belies the existence of an agreement between Dayhoff and Hershey, an agreement that purportedly lies at the basis of appellees' argument." *Id.* Petitioners respond that this criticism is "easily answered," Pet. at 14 n.3, but then proceed to provide no answer whatsoever. They merely repeat the terms of the bargain offered by the District Court, neglecting to point out that Hershey and the other nonsignatory defendants expressly disavowed every part of the Dayhoff contracts until the District Court conditioned its dismissal upon their voluntary acceptance of Italian jurisdiction. *See* Pet. App. at 54a.

When Dayhoff commenced this action, it did not have the option of filing an arbitration in Italy against the nonsignatory defendants, because Dayhoff had made no agreements with them. The District Court erroneously granted an option to the nonsignatory defendants, thus ordering arbitration (and foreign adjudication) not in accordance with, but in opposition to, the terms of the contracts. The Third Circuit correctly reversed because there was no agreement to arbitrate, an absence made manifest by the District Court's permitting defendants to accept or decline arbitration as they pleased, but denying that option to Dayhoff. The District Court's approach was completely at odds with *Kaplan*, whereas the Third Circuit correctly followed the teachings of this Court.

II.

THE CONFLICTS ALLEGED BY PETITIONERS DO NOT WARRANT CERTIORARI BECAUSE THE COURTS OF APPEALS HAVE NOT YET HAD THE OPPORTUNITY TO RECONSIDER THEIR PRECEDENTS IN LIGHT OF THIS COURT'S DECISION IN *KAPLAN* AND THE THIRD CIRCUIT'S APPLICATION OF *KAPLAN* HERE.

Petitioners identify three decisions with which the decision of the Third Circuit purportedly is in conflict: *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); and *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 190 (1994). What is most readily apparent about these three decisions is their age: all predate the decision of this Court in *Kaplan*. Indeed, all predate the decision of the Third Circuit in *Kaplan*, which this Court affirmed. Petitioners have not identified any authentic, post-*Kaplan* conflict among the courts of appeals.

Thus, to the extent the opinions in *Manetti-Farrow*, *Rhone Poulenc*, and *Sunkist* are inconsistent with the decision of the Third Circuit here, this Court should deny the petition for a writ of certiorari and allow the courts of appeals time to bring their precedents into conformity with *Kaplan*. It is to be expected that the "conflict" will dissolve after the other courts of appeals become familiar with *Kaplan*'s strong endorsement of contract law fundamentals in arbitration cases, and with the Third Circuit's thoughtful application of *Kaplan* to a multiparty case involving international arbitration and forum selection provisions.

In *Manetti-Farrow*, the Ninth Circuit applied a forum selection clause in a contract between Manetti-Farrow and Gucci Parfums, S.p.A., to tort claims brought by Manetti-Farrow against a variety of Gucci entities. The analysis of the Ninth Circuit concentrated on the question whether the tort claims were related to interpretation of the contract. *See* 858 F.2d at 513-14. The court virtually ignored what *Kaplan* later identified as the salient issue: did the plaintiff actually *agree* to the forum selection clause with the other defendants? The Ninth Circuit dispensed with this question in a short footnote, stating that " 'a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.' "[4] *Id.* at 514 n.5 (quoting *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984)). This type of vague policy analysis is completely contrary to the holding of *Kaplan*, as is made clear by substituting "arbitration" for "forum selection" in the quotation from the footnote in *Manetti-Farrow*: "a range of participants, parties and non-parties, should benefit from and be subject to arbitration clauses." This is precisely the opposite of what this Court held in *Kaplan*.

Clearly, *Manetti-Farrow* must be reexamined in light of *Kaplan*, and the appropriate court to carry out that task in the first instance is the Ninth Circuit itself. There is no reason to believe that the Ninth Circuit will not follow the clear teachings of *Kaplan* when an appropriate case comes before it. This Court need not devote its resources to confirming that *Manetti-Farrow* is not good law after *Kaplan*. The inconsistency between *Manetti-Farrow* and the Third Circuit's decision here is not a legitimate, current conflict, and does not warrant the exercise of jurisdiction by this Court.

Both *Rhone Poulenc* and *Sunkist* erroneously emphasized,

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4. Petitioners do not quote this language in their summary of the Ninth Circuit's holding in *Manetti-Farrow*. *See* Pet. at 7-8.

as a justification for allowing a nonparty to enforce an arbitration agreement, the parent-subsidiary relationship between a contracting party and the nonparty seeking to enforce the arbitration clause. *See Rhone Poulenc*, 863 F.2d at 320-21; *see also Sunkist*, 10 F.3d at 757-58. The Third Circuit's response to this type of argument is unanswerable:

> We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration and forum selection clauses, for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters.

86 F.3d at 1297 (Pet. App. 22a).[5] Noticeably absent from the opinions in *Rhone Poulenc* and *Sunkist* is attention to the vital norm, emphasized by this Court in *Kaplan*, of enforcing arbitration agreements according to their terms, not according to whichever ad hoc principle of construction captures the greatest number of nonsignatory parties.

The important question, however, is not whether these decisions are at least partially wrong, but rather how the law should be corrected. This Court already has spoken in *Kaplan*, clearly and unanimously. The Third Circuit recognized the significance of *Kaplan* and applied its teachings here. It is to be expected that other courts of appeals, like the Third Circuit, will

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5. In fact, the District Court refused to pierce the corporate veil between Heinz and Heinz Italia, or between Hershey and Heinz Italia, for purposes of attributing jurisdictional contacts. *See* Pet. App. 60a. The Third Circuit reversed on different grounds, finding that personal jurisdiction exists over Heinz Italia. *See* 86 F.3d at 1301-03 (Pet. App. 35a-38a).

follow the teachings of *Kaplan* as they are obligated to do. This Court need not take further action until the other circuits have had such an opportunity.

III.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH TRADITIONAL RULES OF CONTRACT LAW AND DOES NOT THREATEN THE UTILITY OF ARBITRATION OR FORUM SELECTION PROVISIONS IN CONTRACTS.

Nothing in the opinion of the Third Circuit threatens to undermine the usefulness of arbitration or forum selection clauses, properly employed, in commercial contracts. Petitioners' fear of the seductive nature of the American jury trial system, *see* Pet. at 15, is exaggerated and misplaced. The opinion of the Court of Appeals here simply reaffirms that arbitration and forum selection clauses will be enforced *according to their terms*, no more and no less. In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court, faced with a contracting party bent on "ignoring its contract promise to litigate 'any dispute arising' in the English courts," *id.* at 3, enforced a forum selection clause *agreed to by both plaintiff and defendant*. This principle — of treating forum selection clauses according to the normal rules of contract law — was applied appropriately by the Third Circuit here. Adherence to this principle will strengthen, not weaken, contractual agreements to define in advance the parameters of dispute resolution between the contracting parties.

Petitioners suggest that, as a result of the decision in this case, devious plaintiffs will evade arbitration or forum selection clauses "by the simple expedient of pleading a tortious interference claim against an affiliate of the contracting party."

Pet. at 16. This argument is baseless.[6] First, the opinion of the Third Circuit has absolutely no impact on the standards for pleading any type of claim, including claims for tortious interference with contract. If such a claim exists, a plaintiff has every right to plead it, and to assume that the claim will be litigated in the court where it is filed, unless the plaintiff previously agreed with the defendant to resolve such disputes elsewhere. If such a claim does not exist, and the plaintiff is attempting to plead one solely to secure a foothold in federal court, the complaint will be subject to the usual mechanisms for the disposition of meritless claims. Petitioners may believe that it is merely a "simple expedient" for plaintiffs to assert frivolous claims for the sake of a tactical advantage, but Dayhoff does not agree. In any event, even if such an easily exploitable defect is present in the judicial system, it is certainly unrelated to the decision here.

Second, petitioners forget that any party desiring broader protection from an arbitration or forum selection clause, for its affiliates or for itself, may obtain such protection simply by bargaining appropriately and agreeing only to a contract containing clauses with the scope desired. A single sentence in the opinion of the Third Circuit is a complete answer to petitioners' lamentations: "If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration and forum selection clauses, they should have directed Heinz Dolciaria to include appropriate language in the 1989 and 1990 agreements allowing them to do so." 86 F.3d at 1297 (Pet. App. 22a).

Finally, petitioners are plainly mistaken in implying, as their argument does, that the existence of tortious interference claims against noncontracting defendants in this case has enabled Dayhoff to "circumvent" the arbitration and forum selection

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6. The argument is also irrelevant to Dayhoff's claims against petitioner Hershey, which is not an affiliate of any contracting party.

clauses in its contracts. Applying a contract according to its terms is enforcement, not circumvention, of the contract; petitioners' rhetoric to the contrary simply begs the question. The Third Circuit has enforced the arbitration and forum selection clauses against Dayhoff according to their terms, and has held that Dayhoff must pursue remedies in Italy against Heinz Dolciaria. *See* 86 F.3d at 1298 (Pet. App. 26a). Nothing has been circumvented. Petitioners' dissatisfaction with the result stems from (1) their unsupported prediction that resolution of the tortious interference claims must involve a determination of whether the contracts were breached;[7] and (2) more important, their unjustified belief that any proceeding that will or might involve such a determination must be treated as a direct claim for breach against Heinz Dolciaria. The Third Circuit properly rejected this sweeping overextension of the contractual rights of Heinz Dolciaria, and this Court should reject it as well.

Petitioners distort the scope of the arbitration and forum selection clauses when they assert that the "issue" of breach of contract is "the same issue that the parties to those contracts agreed to have adjudicated in Italy under Italian law." Pet. at 16. Dayhoff agreed only to have certain *claims*, or "controversies," to use the nomenclature of the arbitration clause, disposed of in Italy. *See* 86 F.3d at 1289 (Pet. App. 4a). The fact that a claim for tortious interference with contract brought by Dayhoff against a noncontracting party might involve an "issue" of whether the contract was breached does not convert that issue into a claim subject to the arbitration or forum selection clauses. Accepting petitioners' argument would mean, in effect, that every signatory to a contract is an indispensable party to any tortious interference litigation touching upon the contract, even if the actual defendants are nonsignatories. Dayhoff is unaware of any

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7. *See* Counterstatement of the Case, *supra*.

authority endorsing this strange view, and petitioners have cited none.

Finally, it should be noted that by prosecuting its claims for tortious interference against the noncontracting defendants, Dayhoff is not "attempt[ing] to obtain the same relief," Pet. at 16, as it might otherwise have obtained on its claims for breach of contract against Heinz Dolciaria. The claims for breach of contract are separate and distinct from the claims for tortious interference. Dayhoff is entitled to a remedy for every claim it succeeds in proving, regardless of defendant or forum.

IV.

THE QUESTION PRESENTED BY PETITIONERS IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT.

The final portion of petitioners' argument reveals fatal flaws in their contention that this Court must intervene to resolve an alleged dispute among the circuits and to head off an avalanche of litigation over arbitration and forum selection clauses. First, petitioners concede that litigation over the proper interpretation of such clauses will proceed "on a case-by-case . . . basis." Pet. at 17. Such litigation would continue, however, even if the Third Circuit had reached the opposite result in this case. Even if the courts were given license to apply arbitration and forum selection clauses in the expansive manner preferred by petitioners, controversies would continue to arise. The language of every contract is different, and even well-established, black letter rules for contractual interpretation have failed to eliminate disputes over mundane matters of contract law. Simply declaring, for example, that an arbitration clause may govern nonsignatory defendants will not prevent litigation. Legions of hopeful plaintiffs will simply argue that the general rule is fine as

far as it goes, but that the specific circumstances and contractual language in their particular cases demand a different result. In fact, the only rule that has any hope of reducing such disagreements is the one unanimously confirmed by this Court and applied by the Third Circuit here: arbitration clauses and forum selection clauses, like all contracts, will be enforced according to their terms. This rule at least will curtail spurious claims of contractual coverage by nonsignatories, such as the claims of petitioners here, which have added two years to this litigation.

Petitioners also concede that the Fourth, Ninth, and Eleventh Circuits — the homes of what petitioners consider to be decisions in conflict with that of the Third Circuit here — likely will face challenges to their ostensible rules as a result of this case. *See* Pet. at 17. In other words, these courts will be asked to reconsider their previous precedents in light of the decision of the Third Circuit here, and in light of this Court's decision in *Kaplan*. This factor alone is sufficient to warrant denial of the Petition. If the allegedly conflicting decisions are to be put to the test, and possibly revised, by all means let the challenges proceed. The "dissenting" courts of appeals very likely will cure their problems themselves, without the need for further direction from this Court. If, after several such cases, the Third Circuit's reading of *Kaplan* were to be emphatically rejected, and other courts of appeals were to hold that defendants may invoke the protection of clauses in contracts to which they are not parties, then perhaps intervention by this Court would be appropriate. In any event, the dispute would be crystallized in a way that it clearly is not today. Until the decisions that conflict with that of the Third Circuit here have been reexamined in light of *Kaplan*, and the decision below, action by this Court would be premature and unnecessary. The Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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